

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 NOV 23 AM 9:01

SANDRA K MARKHAM, CLERK

BY:

Jacqueline Markham

STATE OF ARIZONA,)

Plaintiff,)

vs.)

JAMES ARTHUR RAY,)

Defendant.)

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY 40

MAY 4, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant.)
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1 Proceedings had before the Honorable

2 WARREN R. DARROW, Judge, taken on Wednesday, May 4,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

(Proceedings continued outside presence of jury.)

THE COURT: The record will show the presence of the defendant, Mr. Ray, and the attorneys.

I just wanted to take up the issue of jurors being excused. And please refer to number with any record you wish to make. But yesterday there was email communication regarding Juror No. 9 and a significant family health concern. And I want to confirm that the parties are aware that that Juror No. 9 has been excused.

Ms. Polk?

MS. POLK: Yes, Your Honor.

THE COURT: Mr. Kelly?

MR. KELLY: Yes.

THE COURT: And then this morning Juror No. 17. And that was the juror that had an illness. And we were hoping he would be able to resume. And he's not. He called in and indicated -- I don't know if he called in or his wife. But he could not come in today, had not slept. I don't think there is really any alternative at this point other than to excuse Juror 17.

Ms. Polk?

MS. POLK: Your Honor, the state would agree.

MR. KELLY: Agree.

THE COURT: So Juror 17 is now excused. And I'm going to direct the jury commissioner --

Or if you have contact, Ms. Rybar, to make sure that both of these jurors understand that they are fully under the admonition until the trial is completed. The admonition will remain in effect.

So I just wanted to make a record on that and see if anybody else had anything to say on that. And I guess we're ready to continue with Detective Diskin on the stand.

I got another motion today having to do with a witness, Sundling. I saw that just this morning.

Mr. Kelly?

MR. KELLY: Judge, if we have a few minutes, perhaps just update the Court, very briefly voice some of our concerns. We were provided -- Ms. Polk provided Mr. Li a list of the proposed remaining witnesses. And they total, I believe, potentially 15 or so. With the states permission, if I could approach and show the email to you, Judge. It's

easier to discuss it.

Just very briefly, Judge, we have three concerns. As to Mr. Sundling, Judge, we would, as indicated by the motion, submit time needs to be set aside for evidentiary hearing and oral argument in that regard, definitely oral argument and possibly an evidentiary hearing regarding his qualifications.

The second issue relates to the participant witnesses. There are several identified. And we submit, Judge, that at some point in time it becomes cumulative.

And then, finally, Judge, the inquiry as to how much time this is going to take. Because we need to schedule our witnesses. And just offhand, that appears to push us well into late June.

And again, Judge, I know the jury is waiting. And, I believe, we would just like to reserve some of your time to discuss those issues in more detail.

THE COURT: Ms. Polk or Mr. Hughes, just from a scheduling standpoint, for argument hearing on these matters. I know the other pending matter and that I've reviewed last night, at least the pleadings had to do with Dr. Kent. That's still

out there.

Ms. Polk?

MS. POLK: Your Honor, the state was just served with a motion to exclude the testimony of Mr. Sundling this morning. I would submit that this should have been a matter of pretrial motion.

Mr. Sundling's existence has been known to the defense long before the trial began. And the Court had imposed a deadline for pretrial motions. And that would include this now challenging Mr. Sundling.

THE COURT: Well, I'm going to look at what has been filed. And we are going to have to set some time aside.

Okay. Then let's get the jury in and get started.

MS. POLK: Your Honor, before we do, though, the state would be moving to admit the client files of the three victims. After the Court looked at them last week, we pulled out documents with respect to the file of Liz Neuman that the Court had indicated would not be admitted.

And then with respect to all three, we have redacted some of the personal information. And so we're having those three marked this

1 morning. We provided copies of what we proposed to
2 move to admit. We provided copies to the defense
3 as well.

4 Does the Court want to look at them
5 before we're in front of jury?

6 THE COURT: If there is an issue about them.
7 I recall indicating what financial type information
8 be available of actual seminars, attended cost of
9 those. We talked about that.

10 Is there any dispute left, any other
11 objection, Mr. Kelly, that you want of record?

12 MR. KELLY: Judge, in regards to the financial
13 information contained on the exhibits, we would
14 submit that to the Court. It's been well briefed
15 and argued.

16 We believe there's a foundation
17 objection. I attempted to -- I understand the
18 proposed foundation was essentially -- well,
19 Detective Diskin found them during a search
20 warrant.

21 If you recall, last Friday I attempted to
22 admit some documents he found during a search
23 warrant, and the state objected. So that puts us
24 in a position of objecting based on foundation to
25 this document. I don't believe that the detective

1 was a custodian of records to lay the --

2 THE COURT: And I indicated before I don't
3 have a general policy. You cannot do that in a
4 case. You have to look at each factual situation
5 as it comes up.

6 But as a general rule, I don't want to
7 have foundation be an issue with disclosed
8 exhibits. I don't want that. I'm going to give
9 the parties in this case a chance to get a
10 foundation witness here if that's what's necessary
11 for foundation.

12 So I would hope those things can be
13 worked out rather than having that kind of expense.
14 I don't think it's possible to work under the rule
15 and the provision of the rule that allows for
16 self-authentication at this point. So I'd like
17 you -- you have no substantive objection other than
18 what you've mentioned before?

19 MR. KELLY: The one we mentioned before,
20 Judge, which has been briefed, we still stand on
21 and object. But we understand your ruling.

22 MR. LI: And, Your Honor, for the record, I'm
23 not sure if we've received the redacted version or
24 not. So I just want to make sure what has been
25 redacted. And if we could go through that.

1 THE COURT: Okay.

2 Ms. Polk, could I please see the redacted
3 versions?

4 MS. POLK: I have provided copies of these to
5 the defense as well, Your Honor.

6 THE COURT: Thank you.

7 The information in this exhibit is just
8 the financial -- direct financial, information
9 relating to each of the alleged victims. It's -- I
10 ruled that it's, essentially, admissible. But
11 there's, I think, technically a foundation issue.
12 Just finding something with a search warrant -- I
13 don't know that that would -- how that would
14 substitute for the business records exception or
15 self-authentication under the rule.

16 But, Ms. Polk?

17 MS. POLK: Your Honor, I do believe we have
18 met the minimal threshold for foundation. The
19 documents were seized pursuant to a search warrant
20 at the business offices of James Ray International.
21 They do appear to be business records.

22 If that foundation is not adequate, the
23 state can call family members who will testify that
24 they recognize the handwriting of each of the three
25 victims. And that would complete the foundation.

1 We had intended to call family members
2 when we started this trial. But in the interest of
3 time, we had made the decision not to call family
4 members. But we can still do so if that remains an
5 objection.

6 The family members are some other matters
7 that they can testify to, the circumstances
8 surrounding which the three victims made the
9 decision to attend Spiritual Warrior, what their
10 plans were, some other things that would be
11 relevant.

12 But in the interest of time, we had made
13 the decision at this time not to call family
14 members. But we can certainly reconsider if the
15 foundation for these documents remains an issue.

16 THE COURT: Well, the defense has stipulated
17 where they were found and how they were found and
18 all that. That's not a question. If that provides
19 foundation -- I have not seen this issue.

20 Mr. Kelly?

21 MR. KELLY: Judge, the issue with foundation
22 is just -- I don't know how to describe it. The
23 incredible position the state takes -- if Detective
24 Diskin's search warrant is adequate foundation,
25 then how can they articulate a foundation in my

1 attempt to admit documents he discovered during a
2 search warrant? I'm sorry. I just don't
3 understand that.

4 I agree with the Court that we should sit
5 down and attempt to expedite this trial by agreeing
6 to foundational matters. I agree. And that's what
7 we intend to do.

8 More importantly, Judge, we've had a
9 chance to look at Liz Neuman's packet. And I
10 understood the Court's order to be that -- I have a
11 Bates stamp 6384. I understood the Court order
12 that page 6384, which identifies the amounts paid
13 by Liz Neuman, would be admissible over our
14 objection.

15 But I was not aware of a Court order, and
16 this is the basis of our objections. As an
17 example, page 6401, there is information on here
18 that I would submit, Judge, has no relevance to
19 this case. It says, continue on the Journey of
20 Power with James Arthur Ray. The path of power is
21 a warrior's path, and it will never be crowded.

22 I use that as an example. It has nothing
23 to do with the amount Ms. Neuman paid. In addition
24 to that, there's a refund policy, billing practice,
25 et cetera, throughout this exhibit.

1 So understanding the Court's order that
2 the amount paid is admissible over our objection,
3 as an example, in this exhibit, Bates stamp
4 page 6384 would be admissible. But we would still
5 submit that this additional information has no
6 relevance and has the potential of being
7 misinterpreted and prejudicial in regards to
8 deciding the outcome of this case, a manslaughter
9 case.

10 THE COURT: So you do have substantive
11 objections of what remains here?

12 MR. KELLY: Correct, Judge.

13 THE COURT: Okay. Well, Detective Diskin is
14 not the witness who can provide foundation at this
15 point. My basic ruling had been initially what was
16 paid for the Spiritual Warrior seminar. And I find
17 that it's appropriate to admit amounts paid for
18 other seminars by the alleged victims.

19 And then this other information -- I'll
20 have to think about the relevance in terms of that.
21 That was not actually -- does it qualify as just
22 this financial, this business practice type of
23 information, which I had ruled was not going to be
24 an issue in the trial unless it was shown to
25 specifically bear on the mental state of an alleged

1 victim? That was in the ruling. If it somehow
2 related to a participant.

3 I think there's been testimony in that
4 regard or evidence in that regard as well. There
5 have been witnesses, at least one, who testified
6 regarding other events attended and paid. I think
7 that evidence has come in.

8 But all of the other descriptions and
9 those things -- I don't have time to hear any
10 further argument on that at this time. But
11 Detective Diskin is not the appropriate foundation
12 witness.

13 So, Mr. Kelly and Heidi, I want to return
14 these exhibits to Ms. Polk and Mr. Kelly.

15 MR. KELLY: Thank you, Judge.

16 THE COURT: And we'll get started here in just
17 a minute.

18 Thank you.

19 (Proceedings continued in the presence of
20 jury.)

21 THE COURT: The record will show the presence
22 of Mr. Ray, the attorneys, the jury.

23 Detective Diskin has returned to the witness stand.

24 Ladies and gentlemen of the jury, I just
25 want to note, as you can see, there are no longer

1 two people on the jury panel. Please do not let
2 that affect your consideration of the evidence in
3 any way. It cannot and must not. So just keep
4 that in mind.

5 And, Mr. Kelly, I think you were
6 conducting cross-examination.

7 MR. KELLY: Thank you, Judge.

8 CROSS-EXAMINATION (Continued)

9 BY MR. KELLY:

10 Q. Detective, how are you this morning?

11 A. Good.

12 MR. KELLY: May I approach, Judge?

13 THE COURT: Yes.

14 Q. BY MR. KELLY: Detective, I am going
15 to -- Detective, I'm handing you what's been marked
16 as Exhibit 985. Do you recognize that box?

17 A. I believe these are the soil samples that
18 we took from inside the sweat lodge. Can I
19 double-check to make sure?

20 Q. Please.

21 A. Yes, sir. These are the samples taken
22 from inside the sweat lodge.

23 MR. KELLY: Judge, I'd move to admit 985.

24 THE COURT: Ms. Polk?

25 MS. POLK: Your Honor, the exhibit is being

1 admitted for demonstrative purposes. Does counsel
2 have a photograph? The protocol set out by the
3 Court with respect to physical evidence.

4 MR. KELLY: I will follow it, Judge.

5 MS. POLK: Your Honor, the state has no
6 objection. But the protocol -- because Mr. Kelly
7 is moving to admit it, it would be Mr. Kelly that
8 would need to follow that protocol.

9 MR. KELLY: We'll substitute a photograph and
10 advise the Court, Judge.

11 THE COURT: Okay. Exhibit 985 is admitted at
12 this time for demonstrative purposes in accordance
13 with the regular policy in the county. There will
14 be a photograph substituted, the same cause
15 number -- or actually provided.

16 (Exhibit 985 admitted.)

17 Q. BY MR. KELLY: And, Detective, those were
18 four soil samples taken from inside the sweat
19 lodge; correct?

20 A. Correct.

21 Q. Let me hand you --
22 May I approach?

23 THE COURT: Yes, Mr. Kelly.

24 Q. BY MR. KELLY: Detective, let me hand you
25 987, 989, 986, and 988. Do you recognize those as

1 soil samples collected from the outside of the
2 sweat lodge?

3 A. That's correct.

4 MR. KELLY: Your Honor, I move with the
5 same understanding to substitute with a photograph
6 those four exhibits.

7 THE COURT: The numbers again, Mr. Kelly?

8 Or, Detective, if you have them?

9 THE WITNESS: 988, 986, 989, and 987.

10 THE COURT: Ms. Polk, same understanding?

11 MS. POLK: Yes, Your Honor.

12 THE COURT: Okay. 986 through 989 inclusive
13 are admitted for demonstrative purposes with a
14 photograph to be provided for the record.

15 (Exhibits 986 through 989 admitted.)

16 THE COURT: Mr. Kelly.

17 MR. KELLY: Thank you.

18 Q. Detective, and again, in case someone
19 didn't hear me, those last four soil samples were
20 taken from outside of the sweat lodge; correct?

21 A. Correct.

22 Q. And you identified the location that each
23 sample was taken, and it is cross-referenced with a
24 photograph and an evidentiary item number; correct?

25 A. I believe so. I don't know if I've seen

1 the photos. I was not there when the outside soil
2 samples were taken. But I believe you are correct.

3 Q. Now, none of those soil samples were
4 tested by the DPS crime lab; correct?

5 A. Correct.

6 Q. Detective, I'd like to go back to your
7 direct examination and ask a few questions. You
8 told Ms. Polk last week that when you arrived on
9 October 9th, 2009, you had been briefed by the
10 lieutenants on the scene; correct?

11 A. I don't think I said that. I'm not sure
12 who briefed me. I remember Sergeant Winslow was on
13 scene. And he had told me what detectives had
14 learned the night before. And also
15 Lieutenant Boelts was on scene.

16 Q. At that time after your briefing, you
17 were looking at a several -- or a couple people
18 that died; correct?

19 A. Yes.

20 Q. Several individuals, participants, had
21 been transported to the hospital; correct?

22 A. Correct.

23 Q. You ruled out carbon monoxide; correct?

24 A. Correct.

25 Q. And you told us that there's a toxicology

1 on the victims indicating no illegal drugs;
2 correct?

3 A. Correct.

4 Q. And my question was, did you know that on
5 October 9th?

6 A. I remember hearing that toxicology was
7 negative on October 9th.

8 Q. And then, presumably, that was the result
9 of a communication between the hospitals and your
10 agency; correct?

11 A. I'm not sure where that information came
12 from. It might have been the fire department.
13 There was one of the fire personnel that was on
14 scene on the 9th. And that may have come from him.

15 Q. Well, you understand that when the
16 participants who went to the hospital, including
17 the two victims on that day, were treated at the
18 hospital, there would have been a blood draw and
19 the blood draw sent to a laboratory to determine
20 toxicology results; correct?

21 A. Correct. Usually they do it right there.

22 Q. Is some other method that an EMS provider
23 could determine toxicology on the scene?

24 A. That's a good question. I don't know if
25 they have any kind of test kits or --

1 Q. Let me rephrase it this way: On
2 October 9th when you were making your assessment
3 and developing your beliefs, you believed that none
4 of these participants were using illegal drugs;
5 correct?

6 A. I don't think I knew when I got there
7 that nobody had used illegal drugs. We were -- you
8 know -- we had no idea what happened.

9 Q. Right. But on direct you said, we ruled
10 out carbon monoxide. And the toxicology on victims
11 indicated no illegal drugs. That's what you told
12 us on direct. And I'm asking you how you developed
13 that belief?

14 A. Let me explain that. We were told that
15 toxicology was negative. I didn't know what all
16 was tested for in the standard toxicology test. I
17 found out later that it was for illegal drugs.

18 Q. Okay. So someone on the scene told you
19 toxicology is negative?

20 A. Right.

21 Q. And from that, on October 9th you
22 developed a belief that no one was using illegal
23 drugs; correct?

24 I'm going to strike that question.

25 Let me rephrase it this way: You have no

1 evidence that anyone was using illegal drugs;
2 correct?

3 A. Can I explain?

4 Q. Sure.

5 A. We knew that prior to going into the
6 sweat lodge, James Ray explained to people that
7 they would experience vomiting, that if they passed
8 out, they'd be taken out. He told them the
9 symptoms that they would experience inside the
10 sweat lodge, that it would be extremely hot.

11 Our job was to try and figure out what
12 Mr. Ray was going to do to cause those symptoms of
13 vomiting and passing out. And so we didn't know
14 for sure what could have been used in the sweat
15 lodge to create those symptoms.

16 Q. And had you already jumped to the
17 conclusion that it was your job to figure out what
18 Mr. Ray had done?

19 A. What I'm explaining is that we knew that
20 Mr. Ray told the participants going into the sweat
21 lodge that they were going to experience vomiting,
22 that they may pass out. And we wanted to know what
23 caused that.

24 Q. But you just told us that it was your job
25 to determine what he had done. And so my question

1 was, was that the conclusion that you jumped to
2 immediately, that somehow the responsibility lied
3 on Mr. Ray?

4 A. That's a good question. We wanted to
5 determine what Mr. Ray's referring to, what he uses
6 to cause the symptoms that he promises the
7 participants. That doesn't mean that that's why
8 people died.

9 Q. Okay. So, again, you knew -- you
10 conducted an interview of Ted Mercer; correct?

11 A. Correct.

12 Q. And you did that before you entered the
13 taped off investigative scene; correct?

14 A. No. I think I entered the scene prior to
15 that. I didn't process anything or move anything.

16 Q. And Mr. Mercer had approached you with
17 information; correct?

18 A. Correct.

19 Q. And you told us on direct and -- that you
20 had at your disposal then -- you had the
21 information provided by Mr. Mercer, the information
22 provided during the briefing by fellow law
23 enforcement agents, and the physical evidence or
24 information present on that day, October 9th?

25 A. And the testimony of Sara Mercer.

1 Q. Did you interview Sara Mercer?

2 A. No.

3 Q. Okay. Listen to my question. You
4 personally interviewed Ted Mercer; correct?

5 A. Correct.

6 Q. All the other information would have been
7 secondhand as to witness statements, would have
8 been secondhand through other agents; correct?

9 A. Correct.

10 Q. And then you had the physical evidence,
11 which you could see; correct?

12 A. Correct.

13 Q. And you released the scene in the late
14 afternoon hours of October 9th; correct?

15 A. I think it was about 7:30, 8:30, that
16 night.

17 Q. And you told us on direct that it was
18 necessary to expand the crime scene. Do you recall
19 that testimony?

20 A. Correct. But I don't know if I have the
21 foundation for that because I wasn't there when
22 that happened. That happened the night before.

23 Q. Here's my point: If an important area of
24 an investigation were cordoned off with the
25 investigative tape we talked about last week, that

1 is to preserve that evidence from potential
2 contamination or taint; correct?

3 **A. Correct.**

4 **Q.** And when you then later, several hours
5 later, expand that area as a relevant focus of the
6 investigation, you're going to have to deal with
7 possible contamination; correct?

8 **A. Possibly.**

9 **Q.** Let me state it this way: It would have
10 been a lot better to have the entire area cordoned
11 off originally; correct?

12 **A. Well, if we did that, we wouldn't have**
13 **been able to allow the EMTs in to treat the**
14 **patients.**

15 **Q.** The EMTs entered, and we have
16 photographs, before the tape was ever put up;
17 correct?

18 **A. Correct.**

19 **Q.** Okay. Somebody makes a conscious
20 decision, based on their education, training, and
21 experience as a certified police officer, to
22 identify the area of the investigation; correct?

23 **A. Correct.**

24 **Q.** That area then is expanded; correct?

25 **A. Correct.**

1 **Q.** And my point is, when it's expanded,
2 then, the expanded area has been subjected to
3 unnecessary contamination; correct?

4 **A. Not necessarily. It wasn't roped off.**
5 **But it doesn't mean that somebody contaminated it**
6 **somehow.**

7 **Q.** And it would have been better, would it
8 have not, whoever made that original decision as a
9 police officer, to cordon off the original size
10 that you observed when you showed up on
11 October 9th?

12 **A. I don't think I can testify to what they**
13 **did or if they could have done it better. I'm not**
14 **sure what their reasoning is for their original**
15 **crime scene or the reasoning for expanding the**
16 **crime scene.**

17 **Q.** That wasn't even my question. My
18 question is real simple. Apparently that first
19 detective was wrong, so it was expanded. And by
20 the time you arrived, it would have been better to
21 have the larger area cordoned off?

22 **MS. POLK:** Objection, Judge. Misstates the
23 testimony. And it's a compound question. This
24 witness has testified he doesn't have personal
25 knowledge.

1 **THE COURT:** Sustained.

2 **Q.** BY MR. KELLY: Would it have been better
3 for your investigation to preserve as much of the
4 crime scene as possible? Correct?

5 **A. Correct. We don't know where the crime**
6 **scene is, though. We don't know if the crime scene**
7 **includes the expanded crime scene.**

8 **Q.** Exactly. Exactly. You do not know when
9 you arrive at an investigation what's relevant or
10 not; correct?

11 **A. Correct.**

12 **Q.** And so the larger the area that's
13 preserved, the better one may be able to identify
14 causes, physical evidence related to causes;
15 correct?

16 **A. Possibly.**

17 **Q.** So, as an example, if you were to put the
18 investigative tape at the entrance to Angel Valley,
19 you would have then sealed off the entire facility;
20 correct?

21 **A. Correct.**

22 **Q.** And you could have looked in the shop to
23 see if there was any AMDRO; correct?

24 **A. I didn't even know that there was a shop**
25 **when I was there.**

1 **Q.** You could have looked in the pump house
2 to see if there was any green granular rat poison;
3 correct?

4 **A. Correct.**

5 **Q.** And that would have been preserved, is my
6 point, had you done that?

7 **A. Correct.**

8 **Q.** Now, you also said that the -- on
9 direct -- and if I wrote these down wrong -- you
10 know -- that can happen. So -- but I believe you
11 told us the Hamiltons were cooperative during the
12 investigation. Correct?

13 **A. Correct.**

14 **Q.** And I wanted to correct that. Because,
15 in fact, when you initially attempted to interview
16 them, they said, no. We need our attorney present.
17 So you interviewed them at a later date; correct?

18 **A. No. Can I explain?**

19 **Q.** Sure.

20 **A. Okay. I talked to the Hamiltons**
21 **initially on October 9th. So we had been there all**
22 **day processing the scene. And we pretty much all**
23 **wanted to go home. So I told the Hamiltons -- they**
24 **were wanting to give a statement. I said, I'll**
25 **come back later and interview you guys.**

1 **Then later when I went back to set up the**
 2 **interview, the Hamiltons told me that they'd been**
 3 **contacted by their insurance company. And the**
 4 **lawyer from the insurance company wanted to be**
 5 **present if they were interviewed. So I set up the**
 6 **interview with their attorney.**

7 **Q.** And you also told us on direct -- and if
 8 I wrote this down wrong, correct me -- but we
 9 believe that if toxins were involved, it would have
 10 affected everyone.

11 Do you recall that?

12 **A. Correct.**

13 **Q.** Now, where did you develop that belief or
 14 how did you develop it?

15 **A. Well, it's common sense. You're in the**
 16 **field sweat lodge. And if there's a toxin in**
 17 **there, then you would think everybody would be**
 18 **exposed to it.**

19 **Q.** So you, again, just jumped to that
 20 conclusion without any scientific basis but are
 21 using what you described as common sense; correct?

22 **A. Correct.**

23 **Q.** And you would agree with me that you
 24 don't know whether or not that is a true
 25 assumption; correct?

1 **A. It's probably possible that some people**
 2 **might get sick and others might not. To the extent**
 3 **that it was where people are dying and multiple**
 4 **people are unconscious, it doesn't make sense why**
 5 **some people aren't affected at all.**

6 **Q.** Apply this hypothetical and use your
 7 common sense: If someone is face down in this
 8 sandy area, the floor of this sweat lodge, which is
 9 sealed on the bottom, sealed on top, and someone
 10 had added some type of residential, granular
 11 insecticide to the floor and they're breathing that
 12 directly, then they may be affected differently
 13 than the person immediately next to them; correct?

14 **A. First of all, the floor of the sweat**
 15 **lodge wasn't -- wasn't sealed.**

16 **Q.** Let's talk about that. You never took --

17 **MS. POLK:** Can the witness be allowed to
 18 answer?

19 **THE COURT:** It was a yes or no question
 20 originally. That was the response. And the
 21 detective just went into a narrative.

22 So I'm going to ask the witness,
 23 Detective, if you can answer a question yes or no
 24 please do that. If you can't, let the lawyer know
 25 that.

1 **THE WITNESS:** I'm going to say I can't,
 2 because there was so much information in that
 3 question that I don't know what I'm agreeing to or
 4 not.

5 **Q.** BY MR. KELLY: Let's break it down.
 6 There is 50 some-odd people in the sweat lodge;
 7 correct?

8 **A. Correct.**

9 **Q.** The bottom of the sweat lodge under the
 10 sand has a fabric, which now, 18 months later, has
 11 been described as some type of weed control fabric;
 12 correct?

13 **A. Correct.**

14 **Q.** You never took a sample of that, did you?

15 **A. Never knew it was there. There were**
 16 **several inches of sand on top of it.**

17 **Q.** That's my point. You, during your
 18 investigation, never discovered the bottom layer;
 19 correct?

20 **A. Correct.**

21 **Q.** So now this jury has to make a
 22 determination based on photographs and some witness
 23 testimony as to what that is; correct?

24 **A. Correct.**

25 **Q.** So there is some material underneath the

1 sand on the bottom; correct?

2 **A. I believe so. We've heard testimony to**
 3 **that.**

4 **Q.** Picture paints a thousand word. You've
 5 heard that; correct?

6 **A. Correct.**

7 **Q.** And then on top of the fabric or the
 8 plastic or whatever it is, is some sand; correct?

9 **A. Correct.**

10 **Q.** On top of that is the kiva. And then we
 11 saw the big rubber deal, as described by
 12 Mr. Mercer; correct?

13 **A. Correct.**

14 **Q.** And I believe it was either he or
 15 Ms. Mercer or both who described how they put rocks
 16 around the edge to seal it; correct?

17 **A. Correct.**

18 **Q.** We saw photographs of that; correct?

19 **A. Correct.**

20 **Q.** Now, 50 some-odd folks inside this sweat
 21 lodge; correct?

22 **A. Correct.**

23 **Q.** And they are next to each other; correct?

24 **A. Correct.**

25 **Q.** Now, my question was, in using your

1 common sense, why is it that a person could not be
2 laying down to stay cool, breathe in some type of
3 insecticide, and react differently than the person
4 directly adjacent to them?

5 **A. I suppose that's possible if there is was**
6 **insecticide in there.**

7 **Q.** Isn't that something that a jury is
8 entitled to know and make any determination? I'm
9 going to strike that question, Judge.

10 Let me use your common sense with the
11 same set of facts as to the construction of the
12 sweat lodge. And, say, some insecticide is up in
13 the tarps immediately above the location where an
14 individual is seated.

15 Do you understand my hypothetical?

16 **A. I do.**

17 **Q.** And then a person adds heat and water,
18 steam, and somehow activates those chemicals, and
19 that person breathes that in. Do you believe he
20 might or she might be affected differently than the
21 person immediately adjacent?

22 **A. I wouldn't know.**

23 **Q.** We talked last Friday about the resources
24 available to your department in conducting an
25 investigation. Do you recall that?

1 **A. I do.**

2 **Q.** And you had, Detective -- simple
3 telephone call could have sealed off this area,
4 brought in experts or scientists to answer those
5 types of questions; correct?

6 **A. Possibly.**

7 **Q.** Well, we used the arson example. Do you
8 recall that?

9 **A. But in arson you know what happened.**

10 **Q.** You know what happened before you do your
11 investigation?

12 **A. You know that it burned down.**

13 **Q.** And here you know that two people passed
14 away on October 9th; correct?

15 **A. Correct.**

16 **Q.** And the idea is to collect evidence and
17 try to figure out what happened to those two
18 people; correct?

19 **A. Correct.**

20 **Q.** And you told us a moment ago that the
21 focus was directed at Mr. Ray; correct?

22 **A. That's not exactly what I said. I said**
23 **that Mr. Ray told the participants that they would**
24 **pass out, that they would vomit, that they would --**
25 **and we wanted to know if what he does to cause that**

1 **also caused people to die. So that's --**

2 **Q.** Let me correct you. It's a very
3 important fact. This jury has the exact preswaid
4 lodge speech in evidence. And we've listened to
5 it. And nowhere in there does Mr. Ray say you
6 would pass out; correct?

7 **A. Correct. His testimony was --**

8 **Q.** He said it was hot, hotter, the hottest
9 it's ever been; correct?

10 **A. Correct.**

11 **Q.** And he said that it was hellacious hot;
12 correct?

13 **A. Correct.**

14 **Q.** And he said you are free to leave;
15 correct?

16 **A. I don't know if he used those words.**

17 **Q.** And if you had to leave, which way do you
18 go? And the crowd responds, clockwise. And that's
19 an actual exhibit in this trial; correct?

20 **A. Correct.**

21 **Q.** Now, that's the information that you had
22 in regards to my client's statements -- correct? --
23 on October 9th?

24 **A. Can I explain?**

25 **Q.** Just yes or no.

1 **A. No.**

2 **Q.** Okay. During this investigation, then,
3 when you arrive -- and I want to make this clear --
4 you ruled out toxins because based on your
5 common-sense interpretation of toxins, you believed
6 everyone would be affected? That was your
7 statement?

8 **A. I wouldn't say that I ruled out toxins.**
9 **It just seemed likely to me that everybody would**
10 **have been affected had it been toxins. It wasn't**
11 **enough to say I'm convinced that there is no toxins**
12 **used.**

13 **Q.** Now -- and I'm not trying to put words in
14 your mouth. But I believe I wrote this down
15 correctly: We believe that if toxins were
16 involved, it would have affected everyone.

17 **A. Right.**

18 **Q.** Now, then you focus on heat; correct?

19 **A. Eventually.**

20 **Q.** And, again, you're not a medical doctor;
21 connect?

22 **A. Correct.**

23 **Q.** You're not a chemist; correct?

24 **A. Correct.**

25 **Q.** You're not an engineer; correct?

1 **A. Correct.**
 2 **Q.** You're not an environmental air quality
 3 specialist; correct?
 4 **A. Correct.**
 5 **Q.** But I guess it poses kind of the
 6 question, why wouldn't heat have the same effect?
 7 Why wouldn't it affect everyone?
 8 **A. Well, because what the witnesses**
 9 **explained was that there were -- it was hotter in**
 10 **different parts of the lodge. Towards the back of**
 11 **the lodge it was a lot hotter. And the**
 12 **participants testified that they didn't get any**
 13 **relief when the flap was opened up.**
 14 **Q.** Thank you. So let's use this example.
 15 MS. POLK: Your Honor, again --
 16 THE COURT: You may finish your answer,
 17 Detective.
 18 **Q.** BY MR. KELLY: I'm sorry.
 19 **A. Yes. The participants closer to the**
 20 **door -- they explained that when the flap was open,**
 21 **they could feel cool air coming in, fresh air**
 22 **coming in. And so it made sense that heat could**
 23 **have affected the people in the hotter part of the**
 24 **lodge but not the people by the door.**
 25 **Q.** And, of course, how does that explain how

1 Liz Neuman is leaning up against the legs of Laura
 2 Tucker? One passes away, one doesn't.
 3 **A. I think Laura Tucker left.**
 4 **Q.** How does it explain -- we've heard from
 5 the participants that only select people in certain
 6 parts of the lodge pass away, where others, such as
 7 Dr. Jeanne Armstrong, apparently ecstatic about
 8 having completed the sweat lodge?
 9 Do you recall that testimony?
 10 **A. I don't recall that she said, ecstatic.**
 11 **Q.** Well, that was my word. She went out and
 12 the rocky poses came out; correct?
 13 MS. POLK: Your Honor, I'm having trouble
 14 hearing Mr. Kelly.
 15 MR. KELLY: I tried to use this, but it's
 16 broke.
 17 I'll strike the last question.
 18 **Q.** So, Detective, you made an assumption
 19 based on common sense without the education or
 20 training, experience, relating to physiology, that
 21 heat somehow would not affect everyone identically
 22 but that toxins would. Fair statement?
 23 **A. I need you to give me a time frame.**
 24 **Q.** On October 9th, 2009, when you're
 25 conducting this investigation.

1 **A. Right. That's not a fair statement. We**
 2 **didn't know. I mean, we believed that, yeah. It's**
 3 **a sweat lodge. It gets hot. Maybe heat caused**
 4 **this. But we didn't know.**
 5 **Q.** Then on that date -- you also said on
 6 direct that you were asked a series of questions
 7 about the rock pit in the center of the sweat
 8 lodge.
 9 Do you recall that?
 10 **A. I do.**
 11 **Q.** And you and Ms. Polk went through how
 12 that pit, based on your personal observation, was
 13 located approximately in the center and was not
 14 offset; correct?
 15 **A. No. I know that it was offset a little**
 16 **bit, to some degree, because of the diagram that we**
 17 **had seen. But when I was there, it appeared to be**
 18 **in the center.**
 19 **Q.** Well, let's put up Exhibit 414 in
 20 evidence. And Exhibit 414 is the state's evidence;
 21 correct?
 22 **A. Correct.**
 23 **Q.** It's not from the defense; correct?
 24 **A. Correct.**
 25 **Q.** And it shows the pit offset; correct?

1 **A. It does.**
 2 **Q.** You told us on direct that you -- and
 3 when I say, you, your agency -- considered the
 4 possibility of reconstructing a sweat lodge;
 5 correct?
 6 **A. Yes.**
 7 **Q.** And that your supervisors discussed it
 8 with you, but on October 9th the sweat lodge had
 9 not -- or excuse me. On October 9th or on a later
 10 date, you can never replicate exactly what happened
 11 on October 8th; correct?
 12 **A. Correct.**
 13 **Q.** That you could not replicate -- and I
 14 wrote those down -- the quality of air; correct?
 15 **A. Correct.**
 16 **Q.** You cannot replicate the exact
 17 construction; correct?
 18 **A. Correct.**
 19 **Q.** You cannot replicate how much carbon
 20 dioxide was in the air; correct?
 21 **A. Correct.**
 22 **Q.** You could not replicate how much carbon
 23 monoxide was in the air; correct?
 24 **A. I don't remember talking about carbon**
 25 **monoxide.**

1 Q. You had -- and I believe these are your
2 words -- no idea how hot it was during the
3 ceremony. Correct?

4 A. Correct.

5 Q. You had no idea as to the exact number of
6 participants; correct?

7 What I mean is, the exact number of
8 participants who were subjected to the inside of
9 the sweat lodge. Correct?

10 A. Per round. Some came out. Some went in.
11 And it's almost impossible to determine how many
12 participants were inside for round 1 and round 2
13 and so forth.

14 Q. And you have no idea as to how long the
15 door was open between rounds; correct?

16 A. Correct.

17 Q. Now, here you are with your supervisors
18 discussing the possibility of reconstructing a
19 sweat lodge to replicate what happened, to help in
20 your investigation. And these factors are
21 identified; correct? Or discussed?

22 A. I don't think most of those factors were
23 discussed while on scene.

24 Q. Anytime. When you told us on direct that
25 your supervisors and you discussed the possibility

1 of reconstructing the sweat lodge; correct?

2 A. Correct.

3 Q. And then you told us about these factors
4 that make that almost impossible; correct?

5 A. Correct.

6 Q. Now, my question is -- was simply you did
7 talk about reconstructing the sweat lodge, and you
8 did talk about these factors with your supervisors;
9 correct?

10 A. We talked about whether or not we were
11 going to take the entire sweat lodge. I don't
12 remember talking about those factors with my
13 supervisor on scene.

14 Q. Again, I could have written this down on
15 a direct. And the jury knows what the actual facts
16 are. But I wrote down that you considered the
17 possibility of reconstructing the sweat lodge. Do
18 you recall that testimony?

19 A. Reconstructing that sweat lodge. In
20 other words, taking it and then putting it back
21 together. Because you couldn't take it as one
22 unit.

23 Q. Fine. So you did talk about that;
24 correct?

25 A. Correct.

1 Q. And the reason you talked about that is
2 because that would have been a part of the
3 investigation relating to what happened; correct?

4 A. Possibly.

5 Q. You wouldn't just construct it to take
6 pictures. It was part of the investigation;
7 correct?

8 A. Correct.

9 Q. And then we talked about some factors
10 that you mentioned just a second ago. The quality
11 of air, the heat, the number of participants, how
12 long the door was open; correct?

13 A. Correct.

14 Q. And you had no idea as to those factors;
15 correct?

16 A. Correct.

17 Q. Now, here's my question: Why are those
18 factors so important?

19 A. Because if you're going to accurately
20 rebuild the sweat lodge and recreate it, you would
21 have to know those factors in order to accurately
22 reconstruct it.

23 Q. And you would agree with me -- let's take
24 heat as an example. If you don't know what the
25 heat is inside and you're going to draw a

1 conclusion that someone died from heat stroke, it's
2 important to know how hot it was. Fair statement?

3 A. We didn't know that that's what it would
4 turn out caused the death of these people was heat
5 stroke. We didn't know that at the time.

6 Q. Listen to my question. You identified
7 heat as an important factor; correct?

8 A. Yes.

9 Q. And you didn't know how hot it was;
10 correct?

11 A. Correct.

12 Q. And the reason that's an important factor
13 is because it may affect the physiological response
14 of the participants; correct? You knew that.

15 A. I don't know if I knew that or was
16 thinking that on October 9th.

17 Q. You told us on direct examination in
18 response to a question, there was no evidence of
19 the use of poisons. Do you recall that?

20 A. Correct.

21 Q. That was last week?

22 A. Correct.

23 Q. You told us on direct that there was no
24 evidence of ants during the October 9th, 2009,
25 investigation. Do you recall that?

1 **A. I don't remember making any notes of**
2 **seeing any ants on October 9th.**

3 **Q.** And then later you told us on direct that
4 Ms. Polk, during this trial, asked you to look for
5 ants on the photographs, and you could identify
6 ants.

7 Do you recall that?

8 **A. I do.**

9 **Q.** So in one portion of your testimony, you
10 said on October 9th there was no ants. 18 months
11 later you look at photographs. You blow them up.
12 And now you're telling the jury there is ants?

13 **A. Can I just explain that?**

14 **Q.** Sure.

15 **A. I don't know if there were ants present**
16 **on October 9th because I wasn't looking for ants**
17 **October 9th. Then once during trial it became an**
18 **issue whether or not there were ants, I went back**
19 **through the photos, and I could see ants in the**
20 **photos.**

21 **Q.** So that portion of your direct where you
22 said there was -- and again, I wrote this down and
23 it was before the photograph discussion -- you told
24 us on direct there was no evidence of ants during
25 October 9th investigation. To clarify, you mean

1 you weren't looking for ants on October 9th?

2 **A. Right. I don't remember seeing any**
3 **evidence of ants on October 9th.**

4 **Q.** And do you know the photo number where
5 you can see the ants on the ground under the table?

6 **A. Not offhand. But we have the photo.**

7 **Q.** The Arizona Department of Public Safety
8 Crime Lab exists for the purpose of identifying
9 physical evidence that you cannot see; correct?

10 **A. Correct.**

11 **Q.** You cannot see DNA in my blood; correct?

12 **A. Correct.**

13 **Q.** You don't know my blood type from looking
14 at it; correct?

15 **A. Correct.**

16 **Q.** You don't know whether toxins are present
17 in a material without a crime lab analysis;
18 correct?

19 **A. I guess it would depend on the material.**
20 **But, for the most part, that's correct.**

21 **Q.** And, for the most part, it's correct that
22 you don't know whether or not poisons are present
23 at a scene; correct?

24 **A. Correct.**

25 **Q.** A crime lab is the entity which has the

1 ability to determine air quality; correct?

2 **A. I don't know about air quality.**

3 **Q.** A lab can definitely do that; correct?

4 **A. I don't think so. I'm not sure. We'd**
5 **have to ask the lab. But I've never heard of that.**

6 **Q.** Well, you've heard of environmental
7 engineers who deal with air quality; correct?

8 **A. Correct.**

9 **Q.** You've heard of EPA regulating the
10 hydrogen sulfide that come out of power plants;
11 correct?

12 **A. Correct.**

13 **Q.** Somehow they determine what it is;
14 correct?

15 **A. Correct.**

16 **Q.** In their laboratories; correct?

17 **A. In the DPS laboratories?**

18 **Q.** No. Laboratories was my question. Do
19 you recall our discussion last week about resources
20 available to Yavapai County Sheriff's Office?

21 **A. Correct.**

22 **Q.** And the final part was, I asked you a
23 question whether or not you could submit evidence
24 to a private lab. Do you recall that?

25 **A. I do.**

1 **Q.** And you can do that; correct?

2 **A. Correct.**

3 **Q.** And there are private labs that determine
4 air quality; correct?

5 **A. I would assume so.**

6 **Q.** There was discussion on direct about the
7 nails in two of the four logs you collected. Do
8 you recall that?

9 **A. I do.**

10 **Q.** And there are some nails that are in
11 those logs that are apparently used to nail down
12 the protective covering, the tarps; correct?

13 **A. Correct.**

14 **Q.** You understand, don't you, Detective,
15 that Ms. Hamilton testified that they would never,
16 never, never burn wood that had nails? That was
17 against their policy. Do you recall that?

18 **MS. POLK:** Your Honor, objection. Misstates
19 the testimony of Ms. Hamilton.

20 **THE COURT:** Again, Detective, if you can
21 answer that, if that's a question you believe the
22 premise is correct, you may do so. If you can't,
23 let the lawyer know.

24 **THE WITNESS:** I can answer that with an
25 explanation.

- 1 Q. BY MR. KELLY: You heard Ms. Hamilton
2 say, we would never burn wood that had nails in it;
3 correct? Something to that effect?
4 A. **Correct. I also heard her explanation**
5 **for what she meant by that.**
6 Q. Lo and behold, we open the evidence in
7 front of this jury, and there's some wood that was
8 identified to be burned with nails?
9 A. **Correct.**
10 Q. That was the importance of that evidence,
11 not whether it was roofing nails or framing nails;
12 correct?
13 A. **Correct.**
14 Q. You talked about the carbon strips which
15 are in the evidence cans, that apparently, you
16 understand, that when those materials are heated,
17 the carbon may retain toxins or poisons that are in
18 the air; correct?
19 A. **Correct.**
20 Q. Are in that physical item of evidence;
21 correct?
22 A. **Correct.**
23 Q. You held it up to the jury and you showed
24 it to them; correct?
25 A. **Correct.**

- 1 Q. Do you know whether or not these tobacco
2 pouches that are in evidence may have absorbed some
3 of those chemicals?
4 A. **I don't know.**
5 Q. They were never tested. We know that;
6 correct?
7 A. **Correct.**
8 Q. You told the jury about spikes in the gas
9 chromatograph. And, again, you're not the chemist;
10 correct?
11 A. **Correct.**
12 Q. And so you don't know whether those
13 spikes that you're talking about relate to all
14 organic compounds; correct?
15 A. **Correct.**
16 Q. In addition to just volatiles that you
17 just discussed; correct?
18 A. **I can only go by the conversations I've**
19 **had with the lab. I'm not real sure.**
20 Q. We talked about 2-ethyl-1-hexanol;
21 correct?
22 A. **Correct.**
23 Q. And you told the jury that the spikes,
24 which are evaluated by the crime lab, tell you
25 whether there are certain volatiles, on direct. Do

- 1 you recall that?
2 A. **I do.**
3 Q. And my question is simply, you're not a
4 chemist; correct?
5 A. **Correct.**
6 Q. And unlike a French degree, I have a
7 chemistry degree. So you're kind of at a
8 disadvantage. You don't have any reason to dispute
9 that those spikes you're talking about may identify
10 this compound as well?
11 A. **I don't know.**
12 Q. And we talked about the purpose of an
13 investigation at the very beginning of your
14 testimony. Fair and impartial and objective so
15 that this jury knows what the actual facts are;
16 correct?
17 A. **Correct.**
18 Q. You also told the jury about the tie-back
19 suits that you put on?
20 A. **Tyvek.**
21 Q. Tyvak?
22 A. **I think it's t-y-v-e-k.**
23 Q. Why do you wear those?
24 A. **To protect us and protect the evidence.**
25 Q. From what?

- 1 A. **From blood. Usually blood and things**
2 **like that at a crime scenes.**
3 Q. Things you cannot see; correct?
4 A. **Correct.**
5 Q. Every piece of physical evidence that was
6 handled in this case, you put on those little
7 gloves. Do you recall that?
8 A. **I do.**
9 Q. Why do you do that?
10 A. **To protect the evidence.**
11 Q. To protect the evidence?
12 A. **Correct.**
13 Q. I guess I don't understand. The evidence
14 is complete. The trial is happening. This jury
15 has to make a decision. What are you protecting?
16 A. **I guess it's just protocol. Every time**
17 **we handle evidence, we wear gloves. It's just what**
18 **we do.**
19 Q. In fact, Detective, the reason you wear
20 gloves is for the same reason. In case there's
21 something you can't see on an item of physical
22 evidence that could affect your body; correct?
23 A. **That's also true.**
24 Q. Now, you told us about a HazMat fellow
25 that showed up at the scene. Do you recall that on

1 your direct?

2 **A. Correct.**

3 **Q.** You said he didn't find any carbon

4 monoxide. Do you recall that?

5 **A. Correct.**

6 **Q.** Have you had a chance to see his report?

7 **A. Probably. I've looked at it.**

8 **Q.** That's one of the reports in this case;

9 correct?

10 **A. Correct.**

11 **Q.** And he showed up using an Orion Multigas

12 Detector; correct?

13 **A. I believe so.**

14 **Q.** He arrived at about 8:00 p.m. on

15 October 8th; correct?

16 **A. I don't know.**

17 **Q.** Do you have any reason to dispute his

18 report?

19 **A. No.**

20 **Q.** 7:57 p.m. he arrives?

21 **A. Okay.**

22 **Q.** That's about two and a half hours after

23 the end of the ceremony; correct?

24 **A. Probably a little bit longer than that.**

25 **Yes.**

1 **Q.** After the back of the sweat lodge had

2 been opened to remove the two deceased victims;

3 correct?

4 **A. Correct.**

5 **Q.** The purpose of the HazMat fellow is to

6 clear the scene of any toxins; correct?

7 **A. I believe their purpose was to check and**

8 **see what toxins were present. I don't know what**

9 **they do as far as clearing the scene of toxins.**

10 **Q.** They're firemen; correct?

11 **A. Correct.**

12 **Q.** And they put on the suit and they go in

13 with their Orion Multigas Detector, and they look

14 for oxygen, carbon monoxide, hydrogen sulfide, and

15 flammables; correct?

16 **A. I believe so.**

17 **Q.** And the reason is because you don't want

18 police officers or detectives running into a

19 building that may explode; correct?

20 **A. That would make sense.**

21 **Q.** Or running into a building where they may

22 be poisoned by carbon monoxide or hydrogen sulfide;

23 correct?

24 **A. Sure.**

25 **Q.** They're not there sampling evidence for

1 this jury to consider; correct?

2 **A. I don't know.**

3 **Q.** Well, we haven't heard from a HazMat guy

4 have we?

5 **A. No.**

6 **Q.** Did you realize that his report indicates

7 that, in fact, when he was unfolding an area of the

8 tarp seven -- carbon monoxide was detected at 7

9 parts per million?

10 **A. I'm not aware of that.**

11 **Q.** That's in his report. You have no reason

12 to dispute it; correct?

13 **A. Correct.**

14 **Q.** And you're the case agent; correct?

15 **A. Correct.**

16 **Q.** And you told this jury there was no

17 carbon monoxide when, in fact, his report says

18 carbon monoxide at 7 parts per million; correct?

19 **A. I think what I testified to is there was**

20 **no carbon monoxide in any of the victims**

21 **transported to the hospital.**

22 **Q.** And were you aware that at 9 parts per

23 million of carbon monoxide, it begins to create a

24 concern for human beings?

25 **A. No.**

1 **Q.** Now, Detective, I'd like to go back to

2 your investigation on the scene on October 8th.

3 You told us on Friday each item of evidence that

4 you secured, took into your custody, because it had

5 some relevant police purpose; correct?

6 **A. Correct.**

7 **Q.** And then out of that group of evidence --

8 and it included wood, tarps, clothing, water

9 samples, soil samples, et cetera; correct?

10 **A. Correct.**

11 **Q.** And out of those items of evidence that

12 you seized, you took wood; correct?

13 **A. Correct.**

14 **Q.** And I believe it was four D logs?

15 **A. Correct.**

16 **Q.** And then some pieces of the kiva;

17 correct?

18 **A. Correct.**

19 **Q.** How many pieces?

20 **A. I believe four. There were four --**

21 **Q.** Sticks?

22 **A. Yes. Uprights.**

23 **Q.** And I'd ask you to look at your report if

24 you need to.

25 **A. Okay.**

1 Q. Go ahead. Take a look at how many pieces
2 of the kiva.
3 A. We took four.
4 Q. And then you took the soil samples that
5 we identified; correct?
6 A. Correct.
7 Q. And how many total samples did you take
8 from the scene?
9 A. There were four samples taken October 9th
10 inside the sweat lodge and then four samples later.
11 Q. And these samples are the size of the can
12 that the jury saw this morning; correct?
13 A. Correct.
14 Q. And you took samples of the tarp?
15 A. Correct.
16 Q. You took four 1-foot or four 10-inch
17 samples?
18 MS. POLK: Your Honor, objection. Misstates
19 the nature of the conversation.
20 THE COURT: Sustained.
21 Q. BY MR. KELLY: You took the samples that
22 are in evidence; correct?
23 A. I took the crosscut sections. And
24 they're about 10 inches in length.
25 Q. And you said they are about 10 inches in

1 diameter?
2 A. Correct.
3 Q. The jury saw them. Mr. Hamilton stood up
4 there and showed --
5 MS. POLK: Your Honor, objection. Is there a
6 question?
7 THE COURT: Is there a question?
8 MR. KELLY: There is.
9 Q. The jury saw them?
10 A. Correct.
11 Q. Then you took some rocks; right?
12 A. Correct.
13 Q. And how many rocks?
14 A. We took six rocks from the pit inside the
15 sweat lodge. And we then --
16 Q. Go ahead.
17 A. And then three rocks from the pit
18 outside.
19 Q. Nine?
20 A. Correct.
21 Q. Now, if you need to take a look, perhaps
22 we can put up 345. Do you have a copy of the crime
23 lab report?
24 A. I do.
25 Q. These are the only evidentiary items

1 submitted to the crime lab; correct?
2 A. If I can just cross-reference the
3 evidence number with my evidence log.
4 Q. Let's just take wood, soil, rocks, and
5 tarps. That's the only evidence submitted;
6 correct? Those categories?
7 A. Probably.
8 Q. Well, you didn't submit any of the water
9 samples; correct?
10 A. No.
11 Q. Okay. You didn't submit any of the
12 clothing; correct?
13 A. No.
14 Q. You didn't submit any of the items taken
15 from Carlsbad in California; correct?
16 A. No.
17 Q. Okay. My very general question. Those
18 are the four areas submitted to the crime lab;
19 correct?
20 A. Correct.
21 Q. Now, please take a look at 345. One of
22 the pieces of tarp, which is evidence item 356, was
23 tested; correct?
24 A. Correct.
25 Q. The other evidence item tarp, 358, was

1 never tested. I take it back. It was tested;
2 correct?
3 A. Correct.
4 Q. So item 356, which is a piece of tarp,
5 yielded a result; correct?
6 A. It was the whole crosscut section of the
7 blankets and tarps.
8 Q. Please understand. 356 are all the items
9 in that can. And when they were heated up to about
10 203 degrees -- excuse me. 122 degrees Fahrenheit,
11 there were chemicals detected on one item, which is
12 No. 356?
13 A. There were volatiles. I don't know if
14 volatile and chemical is the same thing.
15 Q. Take a look at the second page. They
16 found one. Detective, in item 356, which is one of
17 the evidentiary items in evidence, one of the cans
18 in the carbon strip, they found some chemicals when
19 they heated it to 122 degrees Fahrenheit; correct?
20 A. Correct.
21 Q. On all the tarps, they found volatiles
22 when they heated it to 122 degrees?
23 MS. POLK: Your Honor, objection to the
24 continued reference to the coverings to the tarps.
25 He's misstating the evidence.

1 MR. KELLY: I'm not trying to misstate the
2 evidence, Judge. I'm trying to do my cross. And
3 it's just vernacular. I'm not trying --

4 THE COURT: With that understanding, it's used
5 in the general sense.

6 Q. BY MR. KELLY: Detective, just a moment
7 ago we talked about Mr. Hamilton; correct?

8 A. Correct.

9 Q. He stood right in front of this jury;
10 correct?

11 A. Correct.

12 Q. He took each can with the tarps and the
13 blankets and pulled them out one by one; correct?

14 A. Correct.

15 Q. You saw that?

16 A. I did.

17 Q. When I refer to "tarps," I'm talking
18 about all the evidentiary items in that can. Okay?

19 A. Okay.

20 Q. I'm not saying that they're all tarps.
21 Are you with me?

22 A. I am.

23 Q. Okay. Now, in item 356, when they heated
24 that can up to 122 degrees Fahrenheit, they found
25 these two chemicals; correct?

1 A. Correct.

2 Q. When they heated both cans to up to 203
3 degrees Fahrenheit, they found volatiles?

4 A. Correct.

5 Q. The soil samples never tested.

6 A. Correct.

7 Q. The rocks -- they tested two; correct?

8 A. Correct.

9 Q. And they found volatiles at 203 degrees
10 Fahrenheit? Go ahead and look at 345 if you like.

11 A. Yeah. What the report says is they found
12 volatiles on everything that was heated to 203
13 degrees.

14 Q. But these are the only items that were
15 made -- let me put it here. They found volatiles
16 at 200; correct?

17 A. Correct.

18 Q. Okay. On No. 500 of the wood, they
19 took -- first of all, the kiva sticks were never
20 tested; correct?

21 A. I believe they were. What happened was
22 we took pieces of kiva sticks off and then made
23 those pieces its own item number and then sent that
24 to the lab. So the item numbers don't really match
25 up. But I can double-check.

1 Q. Well, answer this question so we can move
2 on. When they heated up No. 500, which is a
3 portion of one of the D logs, to 122 degrees
4 Fahrenheit, they found alpha-terpineol; correct?

5 A. Correct.

6 MS. POLK: Your Honor, I believe that
7 misstates the evidence. It was at 203 degrees
8 Fahrenheit.

9 THE COURT: Mr. Kelly?

10 MR. KELLY: If I can find it, Judge, I'll
11 check the exhibit in just a second. I believe
12 that's correct, Judge.

13 THE COURT: Ms. Polk, do you disagree with the
14 temperature?

15 MS. POLK: He said the higher temperature,
16 Your Honor, not the lower temperature. I believe I
17 heard Mr. Kelly say the 120 degrees that the D logs
18 had the terpeneol.

19 THE COURT: We might as well get this clear.

20 MR. KELLY: If we can see the bottom paragraph
21 of the first page. Please blow that up.

22 Q. It says, item 500 was heated to 50
23 degrees centigrade for eight hour; correct?

24 A. Correct.

25 Q. And you don't have any reason to dispute

1 that that's 122 degrees Fahrenheit, do you?

2 A. That's correct.

3 Q. Now, if we turn to page 2, at that
4 temperature, trace amounts of alpha-terpineol and
5 terpeneol-4-ol were detected on that piece of wood;
6 correct?

7 A. Correct.

8 Q. Now, stated more simply, never tested the
9 soil through the crime lab; correct?

10 A. Correct. I sent it to the lab.

11 Q. You never communicated with Ms. Sy;
12 correct?

13 A. Correct.

14 Q. When these items, these two items,
15 item 500 and item 356, were heated to about 122
16 degrees Fahrenheit, they showed the presence of
17 some chemicals; correct?

18 A. Correct.

19 Q. You didn't call back to Ms. Sy to find
20 out what those chemicals were; correct?

21 A. Correct.

22 Q. And then, as you told us, as to the three
23 items which were heated up to 203 degrees
24 Fahrenheit, they found volatiles on everything;
25 correct?

1 **A. Correct.**

2 **MR. KELLY: Judge, can I ask what time**
3 **you were planning on taking a break?**

4 THE COURT: We do need to take a recess. This
5 is fine. Otherwise within 15 minutes.

6 MR. KELLY: If it's okay, my preference would
7 be to take a break now, and then I'll finish in
8 about 30 minutes.

9 THE COURT: We'll do that.

10 Ladies and gentlemen, we'll take the
11 morning recess. Please remember the admonition.
12 Please be reassembled at quarter till, so about 15
13 minutes.

14 And we are in recess.

15 (Recess taken.)

16 THE COURT: The record will show the presence
17 of Mr. Ray, the attorneys, the jury. And the
18 witness is back on the witness stands.

19 Mr. Kelly?

20 MR. KELLY: Thank you, Judge.

21 Q. Detective, I'd like to have you just open
22 and show the jury the size of the soil samples that
23 have been admitted as Exhibit 985, please.

24 **A. I'm going to grab some gloves.**

25 Q. And those -- where did you locate those

1 or collect those soil samples?

2 **A. This was inside the sweat lodge.**

3 Q. And how many did you collect all
4 together?

5 **A. Four.**

6 Q. And those four samples in Exhibit 985 are
7 all the same size; correct?

8 **A. Correct.**

9 Q. Now, hold up the other exhibits, I think
10 988 as an example. What day were those samples
11 collected? Do you recall?

12 **A. I believe it was October 30th.**

13 Q. I just wanted to show the size. Go ahead
14 and have a seat. And let's get this stuff out of
15 your way. I think one thing we established is as
16 to the soil samples, there was no follow up;
17 correct?

18 **A. Correct.**

19 Q. And I think, in fact, those soil samples
20 were never even submitted to the crime lab;
21 correct?

22 **A. No. They were submitted. They weren't**
23 **tested.**

24 Q. Why don't you check your notes?

25 **A. They were submitted.**

1 Q. Well, in Exhibit 345, which we have,
2 they're not identified; correct?

3 **A. Correct.**

4 Q. So let me see what you're referring to.

5 **A. Can I just explain?**

6 Q. Well, let me see what you're referring to
7 first.

8 **A. That's the lab report. It's not related.**

9 Q. And there's an Exhibit 584, which are the
10 criminalist's notes; correct?

11 **A. Correct.**

12 Q. They don't make reference to the soil
13 samples; correct?

14 **A. Correct.**

15 Q. But you think they were actually mailed
16 in?

17 **A. Right. I can explain what happened.**

18 Q. Go ahead.

19 **A. All the evidence goes through Flagstaff**
20 **lab. And all this evidence, including the soil**
21 **samples, were sent to the Flagstaff lab. Then from**
22 **the Flagstaff lab, they're taken to the Phoenix**
23 **lab, which is where they're tested, the rocks and**
24 **wood and things were tested. The soil samples**
25 **didn't go from the Flagstaff lab to the Phoenix**

1 **lab.**

2 Q. And you, as the case agent, would have
3 been the person who made the request as to which
4 items of evidence would be tested. Fair statement?

5 **A. Right. We requested that the soil**
6 **samples be tested.**

7 Q. And they didn't?

8 **A. They didn't.**

9 Q. When did you make that request?

10 **A. I believe it's in the same request as the**
11 **wood and the rocks and everything else.**

12 Q. You would defer to Ms. Sy when she
13 testifies as to what her instructions were?

14 **A. Can I explain?**

15 Q. Yeah.

16 **A. Ms. Sy works at the Phoenix lab. She was**
17 **never given the soil samples for testing. It**
18 **wasn't her decision not to test them. For whatever**
19 **reason, and I haven't been able to find out why,**
20 **the Flagstaff lab didn't send them to Dawn Sy in**
21 **the Phoenix lab.**

22 Q. And I was going to ask you that question.
23 Why wouldn't the Flagstaff lab send soil samples
24 that you thought were important in your
25 investigation to be tested, if you know?

1 **A. I don't know.**

2 **Q.** Well, we do know that we don't have the
3 results here in front of this jury; correct?

4 **A. Correct.**

5 **Q.** Now, Detective, I'm going to try to put
6 up on the screen this chart I made. And before I
7 do that, I'm going to go back and --

8 Could we put up 345 and blow up item 356?

9 Just so we're clear, the crime lab itself
10 refers to these materials as tarps; correct?

11 **A. Pieces of material, tarp. Yes.**

12 **Q.** Okay. And I have to apologize for my
13 writing. Take a look up here at the overhead. And
14 what the Flagstaff and DPS crime lab received from
15 your investigation at Angel Valley was less than
16 four square feet of tarps. And, again, we
17 clarified that. You took four 10-inch squares from
18 the ceiling of the sweat lodge at the four cardinal
19 directions; correct?

20 **A. Correct.**

21 **Q.** Nine rocks; correct?

22 **A. Correct.**

23 **Q.** Four D logs; correct?

24 **A. Correct.**

25 **Q.** And those D logs, you actually splintered

1 off the D log. The entire D log did not go to the
2 crime lab; correct?

3 **A. Correct.**

4 **Q.** And four pieces of the kiva; correct?

5 **A. Correct.**

6 **Q.** Same thing. You took a splinter off
7 those sticks; correct?

8 **A. Correct.**

9 **Q.** And the soil samples were sent to
10 Flagstaff, never tested in Phoenix; correct?

11 **A. Correct.**

12 MS. POLK: Your Honor, objection. Asked and
13 answered, this whole line of questioning.

14 THE COURT: Overruled.

15 MR. KELLY: And I'd ask now that Exhibit 214
16 be put up on the screen.

17 **Q.** And you recall 214, the bottom paragraph
18 was the EMS report that was prepared on
19 October 8th, 2009; correct?

20 **A. I can't really see it.**

21 **Q.** This was the document we talked about
22 Friday that bystanders had said -- stated they had
23 a wood fire and someone was seen placing oils into
24 the fire prior to the incident; correct?

25 **A. Correct.**

1 **Q.** And then also the first sentence of that
2 paragraph.

3 MS. POLK: Your Honor, again, asked and
4 answered. This was covered last week.

5 MR. KELLY: Judge, it's a brief question to
6 make my final point during cross. I'd ask it be
7 allowed.

8 THE COURT: Overruled.

9 MR. KELLY: May I have a moment, Judge.

10 THE COURT: Yes.

11 **Q.** BY MR. KELLY: We've now blown up
12 Exhibit 214. And we talked about this, 214, is an
13 EMS report where the author describes possible
14 chemical exposure on October 8th; correct?

15 **A. Correct.**

16 **Q.** Now, also, Detective, on my little
17 diagram, on October 8th the EMS responders --
18 Exhibit 214 in evidence -- identified possible
19 chemical exposure, and bystanders talked about
20 somebody putting oils on the fire; correct?

21 **A. I wouldn't say they identified a possible
22 chemical exposure. That was -- they speculated
23 that could be it.**

24 **Q.** Well, we won't know because you didn't go
25 interview this guy; correct?

1 **A. Correct.**

2 **Q.** And it's not --

3 MS. POLK: Your Honor, objection. This
4 witness testified at trial.

5 **Q.** BY MR. KELLY: It's not --

6 THE COURT: Sustained.

7 **Q.** BY MR. KELLY: It's not proper to
8 speculate, is it?

9 **A. Correct.**

10 **Q.** And 214 is in evidence; correct?

11 **A. I believe so.**

12 **Q.** And I have not misrepresented 214 when we
13 blew it up; correct?

14 **A. Correct.**

15 **Q.** Then, in addition to that, you heard
16 Exhibit 742; correct? That's the audiotape that
17 was in your possession where the speaker identifies
18 organophosphates and carbon monoxide?

19 **A. Correct.**

20 MR. KELLY: Your Honor, I request permission
21 to play 742, the clip. It's in evidence.

22 MS. POLK: Your Honor, the state would object.
23 It's not appropriate through this witness.

24 THE COURT: Overruled.

25 (Exhibit 742 played.)

1 Q. BY MR. KELLY: Detective, you heard
2 Exhibit 742; correct?
3 A. **Correct.**
4 Q. That was an audiotape of interviews which
5 were conducted during the evening hours of
6 October 8th, 2009; correct?
7 A. **Correct.**
8 Q. First time you've heard that audiotape
9 was Mr. Li's opening?
10 A. **Correct.**
11 Q. And, again, you're the case agent;
12 correct?
13 A. **Correct.**
14 Q. So we get to ask you these difficult
15 questions; correct?
16 A. **Correct.**
17 Q. So on the EMS picture -- the emergency
18 medical services -- you would agree with me that
19 the evidence collected by the Yavapai County
20 Sheriff's Office consists of Exhibit 214 and
21 Exhibit 742 in evidence; correct?
22 A. **Correct.**
23 Q. And you heard the voice on Exhibit 742
24 talk about medical treatment and the possibility
25 of -- I'm paraphrasing -- carbon monoxide mixed in

1 with organophosphates; correct?
2 A. **Correct.**
3 Q. So it's not unreasonable to assume that
4 that was an EMS provider and not a sheriff's
5 deputy; correct?
6 A. **That's what I think it was. We don't**
7 **know who it was. I think it was an EMS person.**
8 Q. Did you get a chance to review Mr. Li's
9 interview of Dawn Gordon where she stated she
10 believes it's an EMS provider?
11 A. **No.**
12 Q. Okay. Now, you also knew on October 9th,
13 that folks were taken to the hospital; correct?
14 A. **On October 8th or 9th?**
15 Q. October 9th when you start your
16 investigation.
17 A. **Right. I learned then that people had**
18 **been taken on October 8th to the hospital.**
19 Q. And let's take a look at Exhibit 366,
20 please, in evidence. Page 116.
21 May I approach the witness?
22 THE COURT: Yes.
23 Q. BY MR. KELLY: Detective, if you can't
24 read what's on the screen, then these are the
25 actual exhibits. And, again, on or during -- let

1 me rephrase that. Before December 14th, 2009, this
2 medical report was provided to the Yavapai County
3 Sheriff's Department; correct?
4 A. **I don't know. I have no reason to**
5 **dispute that.**
6 Q. And in the -- in Liz Neuman's medical
7 records, Dr. Peterson writes, as indicated by the
8 Exhibit 366; correct?
9 A. **Correct.**
10 Q. And he states in that document, it is
11 suspected that she has some sort of toxidrome
12 ingestion but is otherwise not known.
13 Do you recall that?
14 A. **I do.**
15 MS. POLK: Your Honor, could counsel provide
16 the date that this excerpt is being blown up.
17 THE COURT: Mr. Kelly?
18 MR. KELLY: The date of the exhibit, Judge?
19 It's in evidence.
20 THE COURT: As it's being illustrated, could
21 you do that at this point? Thank you.
22 MR. KELLY: If we could see Exhibit 222.
23 Q. You knew prior to December 14th that
24 Sidney Spencer was treated by some medical
25 professionals; correct?

1 A. **Correct.**
2 MR. KELLY: If we could take a look at page 12
3 to 14.
4 Q. And in Ms. Spencer's medical reports, it
5 indicates toxicity secondary to carbon monoxide
6 considerations regarding the possibility of
7 cholinergic organic overdose with relatively myotic
8 pupils; correct?
9 MS. POLK: Your Honor, objection. That
10 misstates -- this is a differential diagnose, not a
11 conclusion.
12 THE COURT: Sustained.
13 MR. KELLY: I read Exhibit 222 correctly?
14 A. **Correct.**
15 Q. And Exhibit 222 is in evidence; correct?
16 A. **Correct.**
17 Q. And Exhibit 222 says, toxicity secondary
18 to carbon monoxide; correct?
19 A. **Correct.**
20 Q. And that information was available to
21 Yavapai County Sheriff's Office before
22 December 14th, 2009; correct?
23 A. **Probably.**
24 MR. KELLY: And finally -- not finally. But
25 if we could take a look at Exhibit 213, page 99 to

1 102.
 2 **Q.** These are the medical reports for Stephen
 3 Ray; correct?
 4 **A.** **I believe so.**
 5 **Q.** Go ahead and take a look. Exhibit 213.
 6 **A.** **What page is this?**
 7 **Q.** Page 102. And they're tabbed for you.
 8 **A.** **Correct.**
 9 **Q.** And for Mr. Ray, the exhibit indicates,
 10 the patient does not appear to have heat stroke;
 11 correct?
 12 **A.** **Correct.**
 13 MS. POLK: Your Honor, could counsel provide
 14 the date for that excerpt?
 15 THE COURT: It's in evidence. It is being
 16 illustrated right now.
 17 If you could show that.
 18 **Q.** BY MR. KELLY: And the date is
 19 October 11th, 2009; correct?
 20 **A.** **Correct.**
 21 **Q.** And Mr. Ray's medical records indicate an
 22 acute toxidrome; correct?
 23 **A.** **Can you blow that up?**
 24 **Q.** Pages 99 through 102. Given the
 25 situation of the event, the differential diagnosis

1 at presentation included acute carbon monoxide
 2 poisoning, acute cyanide poisoning, acute anoxia,
 3 acute hyperthermia, and acute toxidrome; correct?
 4 **A.** **I have no reason to dispute that, but I**
 5 **don't see where that is.**
 6 **Q.** That's right up on the screen there.
 7 **A.** **Correct.**
 8 **Q.** And if we could take a look at
 9 Exhibit 175, which is Mr. Caci's records. At
 10 page 10, under brief history of present illness, it
 11 indicates, we suspect that there were toxic fumes
 12 or carbon monoxide; correct?
 13 **A.** **Correct.**
 14 **Q.** And let's get a date if we could.
 15 October 8th, 2009; correct?
 16 **A.** **Correct.**
 17 **Q.** I believe, on October 17th, 2009, you
 18 issued -- your department issued subpoenas to the
 19 hospitals to obtain these records?
 20 **A.** **I believe so.**
 21 **Q.** But they were clearly available to the
 22 Yavapai County Sheriff's Office before
 23 December 14th, 2009; correct?
 24 **A.** **Correct.**
 25 **Q.** And on my chart, Detective, at the

1 hospital, then, have I correctly indicated the
 2 person's name and the exhibit number indicating the
 3 responses -- or excuse me -- the words that we
 4 discussed during the last 10 minutes?
 5 **A.** **Correct.**
 6 **Q.** Ms. Neuman was Exhibit 366; correct?
 7 **A.** **Correct.**
 8 **Q.** Sidney Spencer was Exhibit 222?
 9 **A.** **Correct.**
 10 **Q.** Stephen Ray was Exhibit 213?
 11 **A.** **Correct.**
 12 **Q.** And Lou Caci was Exhibit 175; correct?
 13 **A.** **Correct.**
 14 **Q.** Now, in addition to that, you heard
 15 testimony of doctors in this case; correct?
 16 **A.** **Correct.**
 17 **Q.** You were present during the interview of
 18 doctors; correct?
 19 **A.** **Correct.**
 20 **Q.** And I believe you told us on direct that
 21 on January 31st, 2011, you attended the interview
 22 of Dr. Ian Paul?
 23 **A.** **Correct.**
 24 **Q.** And I think you told us that that was the
 25 first time you had heard of the word?

1 "organophosphates"; correct?
 2 **A.** **Correct.**
 3 **Q.** You told us you didn't even know what
 4 that was?
 5 **A.** **Correct.**
 6 **Q.** And you recall that Dr. Ian Paul said he
 7 cannot exclude organophosphates; correct?
 8 MS. POLK: Your Honor, that would be a
 9 misstatement of what was said at Dr. Paul's
 10 interview.
 11 THE COURT: I wouldn't know that.
 12 MR. KELLY: I'm asking a simple question,
 13 Judge. I believe I stated it correctly.
 14 THE COURT: I said this a number of times,
 15 Detective. If the premises is correct, you can
 16 answer that in your view. You can do that. If you
 17 can't, just let the attorney know.
 18 **Q.** BY MR. KELLY: Detective, on January 31,
 19 2011, you were present during an interview of
 20 Dr. Ian Paul; correct?
 21 **A.** **Correct.**
 22 **Q.** You heard that he was a certified
 23 emergency room doctor, board certified; correct?
 24 **A.** **I thought he was a medical examiner.**
 25 **Q.** Answer my question. Did you hear him

1 talk about being a board certified emergency room
2 doctor?

3 **A. I don't remember that.**

4 **Q.** Do you recall that he said he was a board
5 certified forensic pathologist?

6 **A. Correct.**

7 **Q.** Did you hear him testify or state that
8 he's a medical examiner for the state of New
9 Mexico?

10 **A. Correct.**

11 **Q.** Did you hear him state that this would
12 the first time he's testified on behalf of a
13 defendant?

14 **A. I don't recall hearing that.**

15 **Q.** Did you hear him talk about
16 organophosphates?

17 **A. I did.**

18 **Q.** And you guys weren't talking about how to
19 poison the ants at your house; correct?

20 **A. Correct.**

21 **Q.** You were talking about this case;
22 correct?

23 **A. Correct.**

24 **Q.** And he said, based on his review -- and
25 I'm summarizing -- but based on the review of all

1 the available evidence, that he could not exclude
2 organophosphates; correct?

3 **A. Correct.**

4 **Q.** Now, on March 29, 2011, in this
5 courtroom, did you hear the testimony of
6 Dr. Cutshall?

7 **A. I did.**

8 **Q.** And did you hear Dr. Cutshall likewise
9 say that he could not exclude organophosphates?

10 MS. POLK: Your Honor, objection to asking
11 this witness to characterize how previous witnesses
12 in this trial have testified.

13 THE COURT: Sustained.

14 MR. KELLY: Judge, this forms the basis of his
15 opinion as to what's important during an
16 investigation.

17 THE COURT: Sustained.

18 **Q.** BY MR. KELLY: On March 31, 2011, did you
19 hear Dr. Lyon testify in this courtroom that he
20 cannot exclude organophosphates?

21 MS. POLK: Your Honor, same objection.

22 THE COURT: Sustained.

23 **Q.** BY MR. KELLY: Detective, you were
24 present in the courtroom during both the
25 testimonies of Dr. Cutshall and Dr. Lyon; correct?

1 **A. Correct.**

2 **Q.** Do you believe, as you told us on direct,
3 that the medical doctors who treated the various
4 participants in this case would have important
5 information relating to your investigation?

6 **A. That sounds about right.**

7 **Q.** Did you ever call Dr. Cutshall before
8 December 14th, 2009?

9 **A. No.**

10 **Q.** Did you ever call Dr. Lyon before
11 December 14th, 2009?

12 **A. I don't think so.**

13 **Q.** You heard Dr. Lyon testify in this
14 courtroom that there was a degree of probability of
15 49 percent he wasn't sure what the cause of death
16 was?

17 MS. POLK: Your Honor, same objection.

18 THE COURT: I think, well, the numbers, the
19 way they were expressed, overruled.

20 If you can answer that, you may.

21 THE WITNESS: Yes. I remember Dr. Lyon said
22 that their burden of proof is 51 percent for
23 determining, I believe, both cause and manner of
24 death.

25 **Q.** BY MR. KELLY: And my question is,

1 Detective, are not these important facts relating
2 to educated, trained, medical doctors providing an
3 opinion as to what happened?

4 **A. Sure.**

5 **Q.** And you were also present during a
6 telephonic interview of Dr. Mosley on April 19th,
7 2011; correct?

8 **A. Correct.**

9 **Q.** And you heard his opinion; correct?

10 **A. Correct.**

11 **Q.** And he provided his direct testimony for
12 a day last week; correct?

13 MS. POLK: Your Honor, objection. He's
14 talking about Dr. Mosley.

15 THE COURT: Sustained.

16 **Q.** BY MR. KELLY: You provided testimony
17 last week; correct?

18 **A. Correct.**

19 **Q.** During that testimony, you told this jury
20 about your opinion as to the causes of the deaths
21 of these participants. Do you recall that?

22 **A. Probably.**

23 **Q.** And did you take into account that
24 Dr. Mosley on April 19th said he cannot exclude
25 organophosphates?

1 **A. Yes.**
 2 **Q.** And is that true, also, despite the
 3 testimony of Dr. Cutshall and Dr. Lyon?
 4 **A. Correct.**
 5 **Q.** So up on this demonstrative exhibit,
 6 under the Doctors, Lyon, Cutshall, Mosley, and
 7 Paul, your opinion is given to this jury despite
 8 the medical opinions of these doctors?
 9 **A. Correct.**
 10 **Q.** Now, Detective, we talked about this over
 11 the last two days, that you sent items to the lab;
 12 correct?
 13 **A. Correct.**
 14 **Q.** And we've outlined that in the flip
 15 chart; correct?
 16 **A. Correct.**
 17 **Q.** And it looks like they tested two rocks;
 18 correct?
 19 **A. Correct.**
 20 **Q.** The two square feet, less than two square
 21 feet, of what I've referred to and Ms. Sy has
 22 referred to as "tarps"?
 23 MS. POLK: Your Honor, asked and answered.
 24 THE COURT: Sustained.
 25 **Q.** BY MR. KELLY: Take a look up on the

1 overhead. What I've very briefly outlined, is that
 2 what the lab tested in this case?
 3 **A. That's correct.**
 4 **Q.** And the lab Exhibit 345 identified the
 5 presence of this chemical 2-ethyl-1-hexanol;
 6 correct?
 7 **A. Correct.**
 8 MS. POLK: Your Honor, objection. Asked and
 9 answered.
 10 THE COURT: It's been answered. Overruled.
 11 **Q.** BY MR. KELLY: And you know that one of
 12 its uses is as an inert ingredient used with
 13 residential insect sprays; correct?
 14 **A. Correct.**
 15 MS. POLK: Same objection.
 16 THE COURT: Overruled.
 17 **Q.** BY MR. KELLY: That's consistent with
 18 Exhibit 742; correct?
 19 **A. I don't know.**
 20 **Q.** That may be consistent with the medical
 21 records we discussed; correct?
 22 MS. POLK: Objection. Personal knowledge,
 23 lack of foundation of this witness.
 24 THE COURT: Sustained.
 25 **Q.** BY MR. KELLY: Would it not be important,

1 Detective, to know whether or not an inert
 2 ingredient which is used in residential insect
 3 sprays is consistent with medical diagnoses of
 4 doctors and those contained in medical records?
 5 **A. I guess it could be.**
 6 **Q.** And that particular chemical might also
 7 be consistent with the testimony and the interviews
 8 you heard from the four doctors; correct?
 9 MS. POLK: Objection. Lack of personal
 10 knowledge.
 11 THE COURT: Overruled.
 12 You may answer that.
 13 THE WITNESS: Can you ask that one more time?
 14 **Q.** BY MR. KELLY: I'm not asking you about
 15 your opinion. You understand, Detective, that this
 16 jury will decide this case; correct?
 17 **A. Correct.**
 18 **Q.** I'm asking you as an investigator, would
 19 it not be important to know whether an inert
 20 ingredient such as 2-ethyl-1-hexanol may be somehow
 21 consistent with the opinions of medical doctors?
 22 Do you understand my question?
 23 **A. I do. But that chemical is in plastic**
 24 **tarps. You're going to find that in tarps.**
 25 **Q.** Okay. Sure. You understand, don't you,

1 that the environmental protection agency regulates
 2 insecticides; correct?
 3 **A. Correct.**
 4 **Q.** It authorizes uses of various chemicals;
 5 correct?
 6 **A. Correct.**
 7 **Q.** You've done a little Internet research
 8 since the beginning of your cross, and you found
 9 out that this chemical is an inert ingredient;
 10 correct?
 11 **A. Correct.**
 12 **Q.** That means it's not the active
 13 ingredient; correct?
 14 **A. Correct.**
 15 **Q.** You also found out that it is used as a
 16 solvent, cosolvent, adjuvant, a surfactance (sic),
 17 a defoamer, and pesticide products used on
 18 agricultural food crops, animals, ornamental
 19 plants, and in residential use of pesticides such
 20 as insect sprays; correct?
 21 **A. Correct.**
 22 **Q.** Now, my point is that there was no
 23 investigation in this case attempting to identify
 24 whether or not the 2-ethyl-1-hexanol would be
 25 consistent with the conclusions of the EMS

1 providers, the medical records, or the doctors;
 2 correct?
 3 **A. Correct.**
 4 **Q.** In fact, we talked about the fact that
 5 less than 1 percent of the sweat lodge was actually
 6 collected by your department in terms of the tarps
 7 and other fabrics; correct?
 8 **A. Correct.**
 9 **Q.** We did the Pi x r squared. 415 square
 10 feet; correct?
 11 **A. Correct.**
 12 **Q.** Out of that, less than that is actually
 13 the amount tested by the crime lab; correct?
 14 **A. Correct.**
 15 **Q.** And despite that conclusion, or despite
 16 that Exhibit 345, there was no follow up; correct?
 17 **A. As far as that particular volatile?**
 18 **Q.** It's not a volatile. In regards to that
 19 particular chemical; correct?
 20 **A. Correct.**
 21 **Q.** There was no follow up with Ms. Sy in
 22 regards to the rocks; correct?
 23 **A. Correct.**
 24 **Q.** There was no follow up in regards to the
 25 wood results; correct?

1 **A. Correct.**
 2 **Q.** Now, you made a presentation to the
 3 medical examiners on December 14th, 2009; correct?
 4 **A. Correct.**
 5 **Q.** And during that presentation, you did not
 6 present any of this information to the medical
 7 examiners; correct?
 8 **A. Correct.**
 9 **Q.** Detective, on the flip chart actually
 10 written these dates down. On October 8th, 2009, is
 11 this tragic accident; correct?
 12 **A. Correct.**
 13 **Q.** And on October 9th, 2009, is when you
 14 arrived as the case agent and collected evidence;
 15 correct?
 16 **A. Right.**
 17 **Q.** You went through how you submitted it to
 18 the DPS crime lab in Flagstaff, which ended up in
 19 Phoenix; correct?
 20 **A. Correct.**
 21 **Q.** And the results were printed on
 22 February 4th, 2010; correct?
 23 **A. Correct.**
 24 **Q.** The indictment on this case was returned
 25 on February 3rd, 2010; correct?

1 **A. Correct.**
 2 **Q.** And you made a presentation to the
 3 medical examiners on December 14th, 2009; correct?
 4 **A. Correct.**
 5 **Q.** Now, you were interviewed by Ms. Do in
 6 June of 2010; correct?
 7 **A. That's sounds about right.**
 8 **Q.** And you were instructed by the county
 9 attorney not to answer questions regarding your
 10 presentation on December 14th; correct?
 11 **A. I think I was able to answer the**
 12 **questions.**
 13 **Q.** Do you recall receiving a court order and
 14 a subsequent interview in September of 2010 after
 15 the county attorney would not allow you to answer
 16 questions about December 14th, 2009?
 17 MS. POLK: Your Honor, objection.
 18 Misstates -- as this witness has just clarified,
 19 that misstates what happened.
 20 THE COURT: Detective, once again --
 21 MR. KELLY: I'll rephrase and clarify.
 22 **Q.** You were interviewed by Ms. Do on
 23 December 14th, 2010; correct?
 24 **A. Correct.**
 25 **Q.** And Deputy County Attorney Steve Sisneros

1 was present; correct?
 2 **A. I believe so.**
 3 **Q.** The interview was tape-recorded; correct?
 4 **A. Correct.**
 5 **Q.** Mr. Sisneros instructed you not to answer
 6 questions from Ms. Do about what you presented on
 7 December 14th, 2009; correct?
 8 Excuse me. I want to rephrase that
 9 question. Mr. Sisneros, who works for Ms. Polk,
 10 instructed you not to answer questions about your
 11 presentation on December 14th; correct?
 12 **A. I believe so. There were certain things**
 13 **that Mr. Sisneros objected to, and from what I**
 14 **remember, I think those questions were asked**
 15 **anyway. I answered them.**
 16 **Q.** Detective, you don't work for the Yavapai
 17 County Attorney's Office; correct?
 18 **A. Correct.**
 19 **Q.** You work for the Yavapai County Sheriff's
 20 Office; correct?
 21 **A. Correct.**
 22 **Q.** Protect and serve. We talked about that;
 23 correct?
 24 **A. Correct.**
 25 **Q.** You work for all the people of Yavapai

1 county; correct?

2 **A. That's correct.**

3 **Q.** Ms. Do was asking you questions about
4 what you did on December 14th; correct?

5 **A. Correct.**

6 **Q.** And the Yavapai County Attorney's Office
7 didn't allow you to answer; correct?

8 **A. I know that they objected for a legal**
9 **reason. I'm not a lawyer. I don't know what goes**
10 **into that.**

11 **Q.** I'm not asking you any legal reason. I'm
12 asking you whether or not you then terminated that
13 interview and Judge Darrow later ordered you to
14 answer those questions?

15 **A. No. I think I ended up answering the**
16 **questions in that interview. And then I later did**
17 **another interview.**

18 **Q.** Just another one because?

19 **A. No. Judge Darrow ordered that several of**
20 **us do additional interviews.**

21 **Q.** Okay. And of course, December 14th,
22 2009, is important because that's the date in which
23 you provided information to the medical examiners
24 before the indictment on February 3rd; correct?

25 **A. Correct.**

1 **Q.** Now, also throughout the course of your
2 investigation, you had some conversations with an
3 individual by the name of Richard Haddow; correct?

4 **A. Correct.**

5 **Q.** You knew that he was retained by a civil
6 attorney on behalf of a civil plaintiff? And that
7 attorney's name is Lou Diesel; correct?

8 **A. Correct.**

9 **Q.** You knew that this individual,
10 Mr. Haddow, had sent you something called a
11 "preliminary report" of his work by email on
12 April 29th, 2010; right?

13 **A. I don't remember the date, but I have no**
14 **reason to dispute that.**

15 **Q.** Okay. You actually during June of 2010,
16 were present during a telephone conference between
17 the county attorney's office and Mr. Haddow, and
18 the focus of the discussion was this case -- or
19 excuse me -- the focus of the discussion was the
20 October 8th, 2009, accident; correct?

21 **A. Yeah. I don't recall the date. But I do**
22 **recall having a conversation with Mr. Haddow with**
23 **the prosecutors.**

24 **Q.** And then you were interviewed by Ms. Do
25 during June of 2010. And during that interview you

1 never mentioned Mr. Haddow's name; correct?

2 **A. Correct.**

3 **Q.** Did you know that Mr. Haddow was
4 disclosed as a witness in this case in September
5 of 2010?

6 **A. I don't.**

7 **Q.** Do you know that after that disclosure,
8 Ms. Do asked to interview Mr. Haddow?

9 **A. I don't know if I was a part of those**
10 **conversations.**

11 **Q.** And you do know -- you heard that this
12 jury was instructed as to the possible witnesses
13 who may testify in this trial. You heard that;
14 correct?

15 **A. Correct.**

16 **Q.** Mr. Haddow wasn't on the list; correct?

17 **A. I don't know.**

18 MS. POLK: Your Honor, objection. There is a
19 rule that does not allow counsel to talk about
20 witnesses not called to trial.

21 MR. KELLY: Judge, there is a specific court
22 order regarding the Brady violation.

23 THE COURT: Objection is overruled.

24 **Q.** BY MR. KELLY: Then, Detective, 29 days
25 after the beginning of this trial, you disclosed

1 that preliminary report from Mr. Haddow to the
2 Yavapai County attorney; correct?

3 **A. No.**

4 **Q.** 29 days after the beginning of trial, the
5 Yavapai County attorney disclosed the preliminary
6 report of Mr. Haddow to Mr. Li; correct?

7 **A. Correct.**

8 **Q.** As a result of that, we had to take a
9 break in this trial; correct?

10 **A. Correct.**

11 **Q.** And the state was sanctioned for the
12 violation?

13 MS. POLK: Your Honor, objection.

14 THE COURT: Sustained. Sustained.

15 MR. KELLY: Judge, if I misunderstood, I
16 apologize.

17 THE COURT: I want to take the recess now and
18 start earlier.

19 So, ladies and gentlemen, we'll take the
20 noon recess at this time. Please be reassembled at
21 1:15. And we'll start as soon as we can after
22 that. Remember the admonition.

23 And I'm going to ask -- Detective, you
24 may step down.

25 I'm asking the parties to remain.

1 Thank you.
2 (Proceedings continued outside presence
3 of jury.)

4 THE COURT: The jury has left the courtroom.
5 One thing I wanted to note. With regard to talking
6 about witnesses called or not, there is a rule that
7 prohibits noting if someone is on a list not being
8 called. I think that's how the rule reads with
9 regard to that.

10 But this is really a different kind of
11 issue about when this witness appeared and how
12 first listed then not listed, then the reports
13 disclosed during trial.

14 I have a concern really with the word
15 "sanctioned." I know there has been a request for
16 that. And I know that the continuance that was
17 granted, the postponement, might in some sense be
18 considered that.

19 But to use that word, that's not a word
20 that the jury would understand and -- anyway. I
21 have a real concern with that and where that's
22 going.

23 Ms. Polk, you made an objection. I'm
24 going to ask you to elaborate first.

25 MS. POLK: Your Honor, I have a couple of

1 objections. First of all, Mr. Kelly is
2 intentionally using -- discussing discovery issues
3 that are not appropriate in front of a jury.

4 Whether a witness is on a witness list
5 and then not -- does not make it to the final list,
6 those are discovery options and not appropriate for
7 the jury. Mr. Kelly is using intentionally
8 inflammatory language, such as Brady violation and
9 the state was sanctioned during a period of time
10 concerning proceedings that took place outside of
11 the jury.

12 Ultimately, Your Honor, what this trial
13 should be about is trying to get to the bottom of
14 the facts. The Court knows and counsel knows the
15 state has requested permission to call Mr. Haddow.
16 I renew that motion at this moment to call
17 Mr. Haddow to the stand to have references to
18 Mr. Haddow, to somehow twist what has happened, to
19 suggest to the jury that -- to suggest that it is
20 the state who is trying to keep Mr. Haddow from
21 testifying to the jury, which to what Mr. Kelly has
22 just done, is completely misleading.

23 This is a search for the truth, a search
24 for the facts. And what Mr. Kelly has just told
25 the jury is that there is a witness out there,

1 Mr. Haddow, that the state knew about. And he has
2 suggested to the jury that it is the state who does
3 not want Mr. Haddow to testify. And, in fact, that
4 is not true.

5 I would renew our motion to allow
6 Mr. Haddow to come and testify in front of this
7 jury, and we can get to the bottom of whether or
8 not what Mr. Haddow has to say is exculpatory or
9 not. Because it is not. And we can have what is
10 relevant about what Mr. Haddow's testimony be known
11 to the jury.

12 This is intentional, misleading conduct
13 in front of the jury intended to make this jury
14 believe something that is absolutely not true,
15 which is that it's the state that is trying to keep
16 relevant information from the jury. And that is
17 not true.

18 THE COURT: Mr. Kelly?

19 MR. KELLY: Judge, the record speaks for
20 itself. I did not ask one question which was not
21 true. There is a Brady violation found by this
22 Court's ruling. When there's a Brady violation,
23 there has to be a remedy, a review of your ruling.
24 And your ruling, as I understand it, is that we
25 were allowed to explore the extent of the Brady

1 violation with a witness who has foundation --
2 which is Detective Diskin.

3 THE COURT: I indicated there could be
4 cross-examination on the circumstances of the
5 disclosure. I think that's how I phrased it.

6 MR. KELLY: To the extent I did not understand
7 it, I've already apologized in front of the jury
8 for using the word "sanction." Everything I said
9 is absolutely true. That is the procedure or the
10 history of the Haddow report. It's entitled a
11 "preliminary report." And I'm permitted to do
12 that.

13 To argue, Judge, the obvious, the
14 government cannot conduct a Brady violation with
15 potentially exculpatory evidence -- and that's the
16 rule of this Court -- and then not expect a
17 consequence for that violation.

18 And we would argue, Judge -- we've argued
19 for jury instructions in that regard, which have
20 not been given. You were -- I thought -- allowed
21 me to discuss, as we've just indicated, the
22 circumstances regarding the nondisclosure.

23 I had one more question, and I was
24 finished. We're still requesting the jury
25 instructions. And I would argue, Judge, it's even

1 appropriate to allow Mr. Li to have 15 minutes of
2 additional opening statement to explain it to the
3 jury. That was a serious violation by the
4 government.

5 We requested a mistrial. It was not
6 granted. And this idea that Ms. Polk thinks that
7 due to a Brady violation, she can determine the
8 experts that we want to use in trial is absurd,
9 Judge.

10 If Mr. Haddow would have been disclosed
11 as an expert a year ago, we would have retained an
12 environmental engineer with qualifications to
13 assess the viability of his conclusions. We would
14 have disclosed that. We would have provided that
15 information to the Court and counsel. We would
16 have prepared our entire defense in that regard.

17 I don't want to rehash the entire Brady
18 violation, but what I've done today is within the
19 scope of what I understand the Court's order today
20 and is entirely permissible.

21 I would urge, Judge, that there has to be
22 some type of sanction that we can use as the legal
23 term imposed on the State of Arizona as a result of
24 this Court finding a Brady violation, which, in
25 fact, related to potential exculpatory evidence.

1 We'd reurge our jury instructions be
2 read. And my suggestion, Judge -- I will rest on
3 cross-examination if that jury instruction
4 submitted to the Court is read when the jury comes
5 back.

6 THE COURT: Ms. Polk continues to assert that
7 this is just not exculpatory information in any
8 fashion.

9 MR. KELLY: Judge, I can assert equally --
10 with equal enthusiasm, there's clearly exculpatory
11 information. It's in his report. We interviewed
12 him for six hours. He was all over the place in
13 regards to his opinion. Said the structure of the
14 sweat lodge, the location of the pit, a heat
15 barrier, and carbon dioxide buildup were
16 contributing factors to the death of the people.
17 That's exculpatory.

18 Ms. Polk in the interview asked a
19 question, what if there had been no heat? He
20 replied, they would have died. That's exculpatory.
21 It was due to carbon dioxide buildup.

22 THE COURT: I've read a good part of that.
23 That was attached. And I've read a good portion of
24 that interview. And I would just say in terms of
25 the assertion, Ms. Polk, you keep saying it's not

1 exculpatory. Again, I think about the level of
2 charging when it's charged as manslaughter and the
3 issue of knowledge, the indication there that, in
4 fact, there may be another party who is very, very
5 responsible and should have done some things. I
6 don't know how you indicate that that's not
7 potentially exculpatory and it's just inculpatory.

8 Difference between negligence and
9 recklessness. Those are factors when you look at
10 this and whether or not it's exculpatory. But I
11 do -- the use of the word "sanction" -- that's
12 misleading to a jury. They don't understand that.
13 The use of the word Brady may conjure up something.
14 Somebody may remember it from somewhere. If that's
15 the case, they might get that idea anyway.

16 I was particularly concerned with the use
17 of the word "sanction."

18 But, Ms. Polk, I did indicate that. This
19 was a report that was disclosed 11 months after it
20 came out. It's a report that arguably pointed a
21 finger at another party as being responsible to
22 some extent or another, arguably. I'm only talking
23 about what the potential evidence is. It's not
24 disclosed. It's disclosed during trial. And
25 that's -- that created this situation.

1 But go ahead.

2 MS. POLK: Your Honor, the remedy for the
3 situation is to allow the witness to testify. What
4 we've had are a series of motions, requests for
5 jury instructions, based on hearsay. Why don't we
6 hear from the witness himself? And then we can let
7 the jury decide how they want to weigh whatever he
8 has to say. That's the remedy. Let's have the
9 author of that report come into court and testify.

10 THE COURT: Why wasn't he just interviewed
11 back on December 10th or December 7th when the
12 request was made?

13 MS. POLK: Your Honor, he would have been.
14 The defense could have interviewed him at any time.
15 The Court knows we disclosed him as a witness. We
16 made the decision not to call him as an expert.
17 The defense had contacted us asking to interview
18 the witnesses. And at that time we said we're not
19 going to call Mr. Haddow.

20 And so then they did not -- at that point
21 they can activate an interview with him or not. We
22 don't set up interviews for witnesses that we're
23 not going to call. But that doesn't mean that the
24 defense could not have interviewed him.

25 Mr. Kelly said that the state never

1 disclosed him as an expert. That's just not true.
 2 We had disclosed him, and we made the decision not
 3 to call him. There's nothing that's unordinary
 4 about that. That's how the normal discovery
 5 process works. You identify witnesses and then as
 6 trial gets closer, you make decisions whether or
 7 not to call them.

8 The defense was aware of him. At any
 9 time they could have chosen to interview him, and
 10 they chose not to. I go back to where we are
 11 today, which is the parties arguing about the
 12 importance or the nonimportance or the facts of
 13 what a witness has to say. Why don't we call that
 14 witness into trial?

15 THE COURT: The rules contemplate -- the law
 16 contemplates that there won't be surprise at trial.
 17 And I talked about that. This case had almost a
 18 six-month grace period, if you will, where people
 19 could really focus in on what the case might be.
 20 The rules don't contemplate litigating a case after
 21 it starts.

22 And now here's a witness and finding
 23 other witnesses. That is the exception. The rules
 24 allow for that exception, but that's not something
 25 that's a common feature of a trial. The rules try

1 to prevent that.

2 The idea is that the parties will be
 3 prepared and present cases. And to just decide
 4 during the trial, well, now this is what we really
 5 need to look into, that's not what's contemplated.

6 MS. POLK: And. Your Honor, I agree with
 7 that. And that's not what's going on here. What's
 8 going on is the defense taking a hearsay document
 9 and excerpts from an interview and arguing them to
 10 the Court and now to this jury.

11 It's not the state who wanted to call
 12 Rick Haddow, but it is the defense now who
 13 continues to talk about Rick Haddow and argue and
 14 want the jury to reach conclusions about something
 15 that is not in front of jury. That's the problem.

16 They have talked about what they perceive
 17 as harm to them because this disclosure -- the
 18 remedy is let the witness come in and testify,
 19 then.

20 Instead, what is going on here is not
 21 bringing in the author, who can talk about what his
 22 opinions are, and the parties can explore the basis
 23 for those opinions.

24 Instead, the defense doesn't want the
 25 author in here. What the defense wants is to

1 continue to argue conclusions, inaccurate
 2 conclusions, about what that author has done or
 3 what he would say. And that's the problem.
 4 THE COURT: And we talked a number of times
 5 about the issue of just bringing a hearsay
 6 statement in and asking if somebody agrees with
 7 that. If the questions are properly presented and
 8 it has to do with the investigation, those kinds of
 9 questions are appropriate.

10 MS. POLK: Your Honor, the state --

11 MR. KELLY: Judge, may I respond?

12 THE COURT: Yes.

13 MR. KELLY: I made one comment from his
 14 report, that it was a preliminary report, period.
 15 The record speaks for itself. Anything else, it
 16 was the timing, the disclosure, the recess from the
 17 trial. And, again, I will not use the word
 18 "sanction." But this is just not what's happening.

19 MS. POLK: Your Honor, if the Court's not
 20 going to allow the state to call Rick Haddow, we
 21 would ask for a jury instructions, then. Mr. Kelly
 22 made far more than one comment.

23 He talked about the email. He called it
 24 a "preliminary report." He talked about the June
 25 conference call between the county attorney

1 prosecutors and Rick Haddow. He had several
 2 questions about the June conference call. He
 3 talked about whether or not the state had disclosed
 4 Rick Haddow as a witness. He talked about whether
 5 or not Ms. Do had asked to interview Mr. Haddow.

6 He talked about whether or not -- he
 7 talked about what the jury had been told at the
 8 beginning of the trial as to who the witnesses
 9 would be. He talked about how 29 days -- several
 10 questions about 29 days ago a report being
 11 disclosed by the county attorney after the trial
 12 had started. Then he talked about a Brady
 13 violation. And then he talked about sanctions.

14 The state would ask for a jury
 15 instruction and will work on appropriate language.
 16 But he has put issues in front of this jury that do
 17 not belong in front of this jury. He's tried to
 18 suggest to the jury that there is important
 19 information that they're not getting. And that is
 20 not at the state's doing that they are not getting
 21 information from Rick Haddow. And then he has used
 22 terms such as "sanctions" and "Brady violation" in
 23 front of this jury.

24 THE COURT: I've talked about that.

25 MS. POLK: But I think a jury instruction,

1 then, that would appropriately instruct them on
2 what they're to look at, what's appropriate, that
3 comments by attorneys are not appropriate.
4 Something to remedy the situation, Your Honor.
5 Mr. Kelly has gone far too far in bringing this in
6 front of the jury.

7 And, again, what I find so troublesome is
8 it is all to suggest that there is a witness that
9 the state is keeping out that has important
10 information for the jury. And it is not the state
11 who is keeping this witness away from the jury.

12 THE COURT: I think it depends on what time
13 frame you look at to answer that.

14 Mr. Kelly?

15 MR. KELLY: Judge, the only time I used the
16 word "Brady" was in response to a speaking
17 objection.

18 THE COURT: There has been some of that.
19 Well, I'll look at any instruction that is
20 presented to me. This is a difficult situation.
21 But it was created by the nondisclosure. That's
22 what created this. Because something is an email
23 doesn't make it anything less than a preliminary
24 report if that's what it is. I don't understand
25 that distinction.

1 Ms. Polk?

2 MS. POLK: Your Honor, I understand the
3 nondisclosure. The Court has issued rulings on
4 that. But nothing permitted Mr. Kelly to stand up
5 here in front of this jury and talk about sanctions
6 and Brady violation.

7 THE COURT: I agree. I agree.

8 MS. POLK: And I objected. He continued, and
9 then I made a speaking objection because in spite
10 of objections, in spite of this Court sustaining
11 Mr. Kelly, he continued with the line of
12 questioning.

13 THE COURT: I'm going to look at your proposed
14 instruction, which I assume is going to address the
15 use of those words specifically.

16 MR. KELLY: Judge, the real violation in terms
17 of justice is the Brady violation. And we have now
18 pending before this Court for over a week, a
19 requested jury instruction. And I would reassert
20 my request that our instruction as it relates to
21 the Brady violation committed by the State of
22 Arizona and my client's potential detriment,
23 potentially cause for a mistrial, be read at the
24 end of my closing arguments today, versus trying to
25 turn this around as somehow it's our fault that we

1 don't have evidence, which the rules and the
2 Constitution obligate the government to disclose.

3 MS. POLK: Your Honor, the state did file a
4 written response to the request for instruction and
5 believes they're completely inappropriate.

6 THE COURT: I realize that, your position.
7 Again, I ruled that there could be

8 cross-examination on this -- in this area. That
9 was part of the way to rectify the extremely late
10 disclosure of exculpatory information.

11 MS. POLK: Your Honor, I think I understand
12 that ruling. I understand cross-examination. But
13 there is something wrong with allowing
14 cross-examination to mislead the jury as to
15 information.

16 MR. KELLY: Judge, I'm going to object. It's
17 on the record. First of all, the personal
18 attacks -- I haven't mislead the jury. The record
19 speaks for itself. All I've done is covered the
20 sequence of events. And I used one term from that
21 document. "Preliminary report." And these
22 personal attacks have to stop. You cautioned
23 Mr. Li and I. We've taken it to heart. And I
24 would ask that the State of Arizona be cautioned as
25 well.

1 MS. POLK: Your Honor, these are not personal
2 attacks.

3 THE COURT: I've always tried to make it clear
4 that the caution goes to both sides.

5 MS. POLK: These are not personal attacks.
6 What I'm talking about is what the jury has been
7 left with, which is the idea that it is the state
8 that is trying to keep Rick Haddow from testifying,
9 and that somehow Rick Haddow has information that
10 would go to the cause of death that would change
11 the information that they have had. That is --
12 it's just not true. The problem is that that is
13 not true.

14 This jury is left with the idea that
15 there is information out there that the state is
16 keeping from them that would be relevant to the
17 cause of death.

18 THE COURT: I'm going to start at 1:15.
19 (Recess.)

20 THE COURT: The record will show the presence
21 of Mr. Ray and the attorneys. The jury is not in
22 the courtroom at this time.

23 I thought about starting off with
24 discussion of the different roles and perspective
25 of the defense and the prosecution and the Court

1 and then following up on what Ms. Polk had talked
2 about regarding the trial being the search for the
3 truth.

4 I'm only going to mention the time that
5 this Court applied the disclosure rules, literally,
6 when Ms. Do was cross-examining Ms. Haley, and a
7 photograph came up that was arguably very relevant.

8 I applied the rules of disclosure because
9 Ms. Polk insisted on that. And the rules are
10 there. And that was the ruling. Now we've got
11 this issue with this late disclosure. I've gone
12 back through and looked at the questions that were
13 asked.

14 And, Ms. Polk, you -- it started with
15 your objection. And Mr. Kelly said, and the state
16 was sanctioned for the violation. I haven't ruled
17 on whether or not I'm going to give any kind of
18 instructions along those lines. But, essentially,
19 with that question, Mr. Kelly was somewhat usurping
20 the Court's interest or role in the instructing.

21 But prior to that time, Mr. Kelly asked a
22 question, Mr. Haddow wasn't on the list; correct?
23 And the detective answered, I don't know. And then
24 Ms. Polk stated, Your Honor, objection. There is a
25 rule that does not allow counsel to talk about

1 witnesses not called to trial.

2 And Ms. Polk, are you referring to
3 Rule 15.4(C)?

4 MS. POLK: I believe so, Your Honor.

5 THE COURT: 15.4(C), which is the rule that I
6 was thinking of when I overruled the objection.
7 The fact that a witness's name is on a list,
8 furnished under this rule, or that a matter
9 contained in the notice of defenses is not raised,
10 shall not be commented upon at the trial unless the
11 Court on motion of the party allows this comment
12 after finding. It goes on.

13 Essentially, as Mr. Kelly indicated,
14 there was a speaking objection implying that
15 Mr. Kelly violated a Court rule, it appears.

16 But Ms. Polk, I want you to be heard on
17 that if you think I'm not analyzing that correctly.

18 MS. POLK: Your Honor, an additional objection
19 would be the foundation, the lack of personal
20 knowledge of this witness to know. Again, we're
21 talking about discovery matters. And this is the
22 detective assigned to the case, who doesn't work
23 for the county attorney's office. So Mr. Kelly is
24 asking him about legal matters, and this is the
25 detective on the case.

1 THE COURT: Then that's when Mr. Kelly, as he
2 indicated in the brief oral argument we had before
3 recessing, mentioned there is a specific order
4 regarding the Brady violation. So it appears that
5 was in response to a speaking objection that,
6 essentially, indicated Mr. Kelly was violating some
7 Court rule.

8 So I'm going to leave this matter as it
9 stands at this point. I do want to ask the defense
10 this and whether it's Ms. Do, Mr. Li, or Mr. Kelly:
11 Is the defense still urging the mistrial? Because
12 I've been thinking a lot about that over the lunch
13 break.

14 MR. KELLY: Judge --

15 MR. LI: Could we have a moment to confer?

16 THE COURT: Yes.

17 MR. KELLY: Judge, we are. Again, I -- you're
18 not asking for any oral argument. We are --

19 THE COURT: No. I'm not going to entertain
20 oral argument. I just want the parties to know,
21 when I look at this, when I try to fashion
22 something that would deal with what I found to be a
23 Brady violation and it not working. I don't know
24 if it's workable.

25 This is unrelated, I suppose. But also,

1 I think there's 17 days, trial days, left. And
2 that's it. I know when I agreed to permit the
3 break, Mr. Li pretty strongly indicated the trial
4 would be completed before the break that's
5 anticipated at the end of next week.

6 And I heard from Ms. Rybar that there are
7 jurors that are inquiring today about the length of
8 the trial. And Ms. Rybar, of course, did the right
9 thing and said, all concerns have to be in writing
10 on a note for me. I don't think she went any
11 further with that. But they've heard me say, so I
12 can go over that with the attorneys.

13 That's really a separate question. It's
14 just something -- I was going to bring that up this
15 morning after I'd heard that from Ms. Rybar. And
16 also with the fact that two jurors are no longer on
17 the panel. But I'm just wondering if this is
18 workable, the way I had envisioned proceeding
19 despite the late disclosure.

20 So, Ms. Polk, I'm not entertaining
21 argument. And -- but I didn't give either side a
22 chance to argue any further. At this point I'm
23 just going to leave this matter. I don't know if
24 Mr. Kelly intends to go into that further with the
25 detective or not.

1 MR. KELLY: Judge, I have -- perhaps, it would
2 be appropriate, three questions. And one is
3 misstating what I believe to be the facts. And
4 that is that the detective, a question along the
5 line that the detective back in April 29th, 2010,
6 had through email bumped that report to the county
7 attorney. And that clarifies, I believe, a
8 misconception to the jury that then that
9 communication was given to the defense 29 days into
10 trial. And as a result, a continuance of the trial
11 took place.

12 Those were my final three questions in
13 this regard.

14 MS. POLK: Your Honor, I'm sorry. I didn't
15 hear what Mr. Kelly said.

16 THE COURT: I didn't hear the end. I can look
17 up here.

18 MR. KELLY: Those were my final questions in
19 this area, that he had passed that on, the
20 April 29th, 2010, email to the county attorney,
21 that it was given to the defense 29 days into
22 trial, and the trial was continued.

23 MS. POLK: Your Honor, two of those
24 questions -- actually, all three, have already been
25 presented to the jury. Two of the three Mr. Kelly

1 already asked of the witness, that this was 29 days
2 into trial.

3 THE COURT: And I have that.

4 MS. POLK: And that the second question -- I
5 don't believe that the witness was asked whether or
6 not the April 29th email was sent to the state. It
7 could have been. I don't have that. I don't have
8 a transcript. But my notes don't indicate that.
9 But the other two questions, first being about 29
10 days into trial, and then the third question, which
11 I've already forgotten again.

12 THE COURT: The continuance. And those were
13 covered, but the other one was not covered.

14 MR. KELLY: Judge, I'll rephrase. I'll ask
15 whether or not the continuance and trial was a
16 result of a constitutional violation that my client
17 experienced. I haven't asked that.

18 THE COURT: I think that gets into what the
19 Court may or may not instruct on at some point.

20 MR. KELLY: Judge, I apologize. But all I'm
21 trying to do is clarify the record when the jury
22 comes back. And, again, I don't need to assert to
23 this Court that this was a Brady violation,
24 constitutional violation. It's very important.

25 And all I'm doing -- I wanted to ask him,

1 and I even gave the state my three rather innocuous
2 questions. On the 29th of April 2010, this
3 detective bumped that to the county attorney, and
4 it was disclosed to the defense after trial, and
5 that was the continuance. That's what I'm asking.

6 THE COURT: I found a Brady violation. But it
7 was a Brady violation during trial that I found
8 potentially correctable. I do not want the
9 suggestion, a legal suggestion, to the jury, at
10 this time anyway, indicating the Court's legal
11 ruling at this time.

12 MR. KELLY: Those were my questions to
13 clarify.

14 THE COURT: I'm sorry, Mr. Kelly.

15 MR. KELLY: Those are my three proposed
16 questions just to clarify what had happened before
17 the break.

18 THE COURT: The one remaining question that
19 hasn't been asked of those three had to do with
20 getting the information forwarded on to the county
21 attorney's office.

22 MR. KELLY: That was a clarification of the
23 previous testimony. But I would ask to be allowed
24 to ask those additional two questions to just put
25 it in perspective.

1 THE COURT: Well, it was broken. Ms. Polk
2 further -- Ms. Polk's correct. Those two questions
3 were asked. It became rather disjointed when it
4 all stopped abruptly.

5 Ms. Polk?

6 MS. POLK: Your Honor, I think the questions
7 have clearly been asked to the jury. I don't
8 believe Mr. Kelly should be allowed to go back and
9 ask those two questions. The one about on
10 April 29th that it was sent by Detective Diskin to
11 the state is the only thing he hasn't asked about.

12 But to allow him to go back and emphasize
13 again that information, I think, is unduly
14 prejudicial. And he should not be allowed to do
15 that.

16 THE COURT: There has been the issue of asked
17 and answered questions. But this started with
18 the -- in the fashion it did with the objection
19 noting the rule, and that's it. Those three
20 questions without any indication or constitutional
21 violation or anything like that cannot be stated.
22 Just to come back with that question right now
23 after there's an exchange of speaking objection and
24 then speaking response. And that's something that
25 needs to be avoided in the future as well.

1 Ms. Polk?

2 MS. POLK: Your Honor, I will stand corrected,
3 but I believe I made an objection. You sustained
4 it. Mr. Kelly continued to question, and that's
5 when I had my speaking objection.

6 THE COURT: It was all at one time. You
7 objected to the question of whether Mr. Haddow was
8 on the list. And then it was actually answered.
9 Then there was the objection and the talk of the
10 rule that doesn't allow counsel to talk about
11 witnesses not called to trial.

12 Then Mr. Kelly responded right away
13 before I did the specific order regarding the Brady
14 violation, and I overruled the objection. That was
15 the sequence.

16 MS. POLK: Your Honor, after I made my
17 objection, Mr. Kelly continued to question before
18 the Court could answer. And that's when I tried to
19 make a stronger record.

20 The other thing I point out, Your Honor,
21 is when we took that break, that five-day
22 continuance, you were careful to instruct the jury
23 that the continuance was that nobody was at fault,
24 nobody was to blame. I don't recall your exact
25 words, but you were careful to say to the jury this

1 is a continuance for legal reasons.

2 And now Mr. Kelly wants to ask the
3 question that says that the five-day continuance
4 was because of some conduct of the state. And that
5 conflicts with how you instructed the jury already.

6 THE COURT: That's -- I recall that.

7 MS. POLK: And, again, those two questions
8 have been asked and answered. I'm failing to see
9 the reason why Mr. Kelly would be allowed to go
10 back.

11 THE COURT: The reason would be because of --
12 I made an order regarding what I found to be a
13 Brady violation. And I was allowing the defense to
14 cross-examine regarding those circumstances.
15 That's been in that order for two weeks or however
16 long it's been.

17 And with the objection regarding the
18 listing, which had to do with the mechanics of this
19 person appearing on a list or being taken off a
20 list, there was an objection. It was overruled.
21 And there is no context now. So that's the
22 reasoning.

23 Anything else?

24 MR. KELLY: No, Judge.

25 MS. POLK: No, Your Honor.

1 (Proceedings continued in the presence of
2 jury.)

3 THE COURT: The record will show the presence
4 of Mr. Ray, the attorneys, the jury.
5 Detective Diskin has returned to the witness stand.

6 Mr. Kelly?

7 Q. BY MR. KELLY: Detective, right before
8 the noon break, we were talking about a
9 communication received from Mr. Haddow; correct?

10 A. Correct.

11 Q. And you received an email transmission
12 back on April 29th, 2010, from Mr. Haddow?

13 A. Right. I don't remember the exact date,
14 but that was about the time frame.

15 Q. When you received it by email, you bumped
16 it to the Yavapai County Attorney's Office?

17 A. Yes.

18 Q. 29 days after trial that email was
19 provided to the defense?

20 A. That's my understanding.

21 Q. And the trial was continued?

22 A. Correct.

23 Q. Now --

24 MR. KELLY: May I approach the witness?

25 THE COURT: Yes.

1 Q. BY MR. KELLY: Do you recognize this
2 photo, Detective?

3 A. I do.

4 Q. Is that the one that you found the ant
5 in?

6 A. It is.

7 MS. POLK: Counsel, could I have an exhibit
8 number, please?

9 THE COURT: Yes.

10 Mr. Kelly?

11 MR. KELLY: I'll have to get it marked.

12 Q. While it's being marked as an exhibit,
13 let me ask you a few very brief questions about
14 Exhibit 809, the second page. On direct you told
15 us that Exhibit 809 shows Mr. Ray as the president,
16 secretary, treasurer, and director of James Ray
17 International; correct?

18 A. Right.

19 Q. Up on the flip chart on an unmarked piece
20 of demonstrative evidence, do you recognize the
21 chart which was produced during the testimony of
22 Melinda Martin?

23 A. I remember you drawing that chart. I
24 don't remember what witness it was.

25 Q. Do you remember Ms. Martin or a witness

1 answering questions about how communications took
2 place throughout the James Ray International
3 entity?

4 **A. Yes.**

5 **Q.** And I was drawing that chart?

6 **A. Yes.**

7 **Q.** Do you have any reason to dispute that
8 that's how actual communications took place amongst
9 the various individuals in James Ray International?

10 MS. POLK: Objection. Lack of personal
11 knowledge, lack of foundation.

12 THE COURT: You may answer if you can.

13 THE WITNESS: I don't know either way. I
14 mean, I know some of it, but most of it I don't
15 know.

16 **Q.** BY MR. KELLY: Were you here during the
17 entire trial?

18 **A. Yes.**

19 **Q.** Someone talked about the communication
20 structure within JRI. Do you recall that?

21 **A. Vaguely. I remember you drawing the**
22 **chart.**

23 **Q.** Remember Melinda Martin, the employee of
24 James Ray International?

25 **A. I do.**

1 **Q.** And my question is simply, you don't have
2 any reason to dispute that actual testimony that
3 took place in this trial; correct?

4 **A. Not really.**

5 **Q.** And there is a difference between the
6 day-to-day running of a corporation like JRI versus
7 the articles of incorporation, which is
8 Exhibit 809; true?

9 **A. I don't know.**

10 MR. KELLY: May I approach, Judge?

11 THE COURT: Yes.

12 **Q.** BY MR. KELLY: Detective, I'm going to
13 hand you what's been marked as Exhibit 1004 and ask
14 you, do you recognize that photograph?

15 **A. I do.**

16 **Q.** Is that the one you found the ant in?

17 **A. It is.**

18 MR. KELLY: Your Honor, I'd move for the
19 admission of 1004.

20 THE COURT: Ms. Polk?

21 MS. POLK: No objection.

22 THE COURT: 1004 is admitted.

23 (Exhibit 1004 admitted.)

24 **Q.** BY MR. KELLY: I believe your testimony
25 on direct was, after hearing Mr. Li's opening

1 argument and after hearing some of the testimony of
2 the witnesses, you went home, looked at exhibits on
3 your computer, and looked for ants and flies.

4 Correct?

5 **A. Not at home. I did it from my office.**

6 **Q.** Okay. At your office you looked for
7 insects; correct?

8 **A. Correct.**

9 **Q.** On 1004 you found an ant; correct?

10 **A. I did.**

11 **Q.** Can you point out about where it is?

12 **A. No. I think it's off the page a little**
13 **bit over here. If you could scoot it over a**
14 **little.**

15 **Q.** Somewhere in that area?

16 **A. I'm not seeing it.**

17 MR. KELLY: May I approach, Judge?

18 THE COURT: Yes.

19 THE WITNESS: I can see it on here. It's
20 easier with a digital photograph because you can
21 zoom in on the computer and you can see it a lot
22 clearer.

23 **Q.** BY MR. KELLY: If you could just point
24 out to the jury the approximate location of where
25 you saw this ant in it's digital photograph using

1 your computer?

2 **A. It's right here. I don't think we've**
3 **zoomed in on the portion where the ant is yet.**

4 **Q.** You also testified, I believe, on direct
5 that you took a look at photographs to look for
6 flies. Correct?

7 **A. Correct.**

8 **Q.** And I believe you told us on one
9 photograph you identified something you believed to
10 be a fly. Correct?

11 **A. I remember seeing several flies in the**
12 **fruit on scene. And then I went back later and**
13 **looked at the pictures. And sure enough, there**
14 **were flies.**

15 **Q.** Correct me if I'm wrong, Detective, but
16 this portion of your investigation took place after
17 the trial had started; correct?

18 **A. Correct.**

19 **Q.** And you believed it was important enough
20 to go back to your office, take a look at the
21 digital photographs to see if you could find
22 insects; correct?

23 **A. After hearing the questions and the**
24 **testimony that people had not seen insects, yes. I**
25 **thought that it was important.**

1 Q. And you're kind of like me. You believe
2 that 70 acres in Central Arizona is simply going to
3 have insects; correct?

4 A. **Probably. Yes.**

5 Q. You told us you were born and raised in
6 Yavapai County; correct?

7 A. **Right.**

8 Q. You spent time over by Oak Creek;
9 correct?

10 A. **Right.**

11 Q. You know there are insects in Oak Creek;
12 correct?

13 A. **Right.**

14 Q. And Detective, finally, this is the first
15 homicide investigation that you were assigned the
16 responsibility of case agent; correct?

17 A. **Right.**

18 Q. Thank you, sir.

19 THE COURT: Thank you, Counsel.

20 Ms. Polk?

21 MS. POLK: Shall I proceed, Your Honor?

22 THE COURT: Yes. When you're ready.

23 REDIRECT EXAMINATION

24 BY MS. POLK:

25 Q. Detective, why did you go back and look

1 for flies and ants in photographs?

2 A. **Because the defense team had made such a**
3 **big deal about --**

4 MR. KELLY: Your Honor, objection. Shifting
5 the burden.

6 THE COURT: Sustained as argumentative.

7 Q. BY MS. POLK: Was it as a result of
8 questions you heard in court that you went back and
9 looked at photographs you had taken at the scene on
10 October 9th of 2009?

11 A. **Yes.**

12 Q. And did you, in fact, see some flies in
13 some of the photographs?

14 A. **Yes.**

15 Q. I'm going to put up on the overhead
16 Exhibit 322. Just ask you if this is one of the
17 photographs that you saw some flies in?

18 A. **Yes.**

19 Q. And can you point out to the jury where
20 you saw flies? And first of all, Detective, will
21 you explain to the jury what you were looking at
22 when you saw flies. Were you looking at a
23 photograph on a piece of paper?

24 A. **No. I was looking at a digital**
25 **photograph on my computer. And these are**

1 **high-resolution photographs. If it's digital, you**
2 **can zoom in and see really close extremely clearly.**
3 **You can't do that when you zoom in on that piece of**
4 **paper.**

5 Q. And is it your testimony, in fact, that
6 you saw flies on this photograph?

7 A. **Yes.**

8 Q. And show the jury where.

9 A. **There's one on this orange peel In this**
10 **glass right here. And then there's one on this**
11 **piece of watermelon. It's hard to tell on the**
12 **picture because there is lots of black seeds that**
13 **look like flies. When you zoom in, you can tell.**

14 Q. Mr. Kelly had admitted 1004, asked you to
15 find the fly -- I'm sorry -- the ant on this
16 photograph?

17 A. **Yes.**

18 Q. Did you look at a digital copy of this
19 photograph?

20 A. **I did.**

21 Q. Did you, in fact, assist in putting this
22 photograph on a CD?

23 A. **Yes.**

24 Q. And is it on this CD in my hand marked
25 Exhibit 1002?

1 A. **Yes.**

2 MS. POLK: Your Honor, I move for admission of
3 Exhibit 1002.

4 MR. KELLY: No objection.

5 THE COURT: 1002 is admitted.

6 (Exhibit 1002 admitted.)

7 Q. BY MS. POLK: Detective, I'm going to put
8 this in and see if you can show the jury what you
9 saw.

10 A. **Okay.**

11 Q. Actually, if you don't mind, I'm going to
12 ask you to come down and open this up. And then
13 you can manipulate it to where you saw the ant or
14 where you see the ant in this photograph.

15 With the Court's permission?

16 THE COURT: Yes.

17 Q. BY MS. POLK: Can you draw a circle where
18 you see it right now before it's too late?

19 A. **You want me to zoom?**

20 Q. Just so the jury knows the area you're
21 zooming in on. Okay.

22 A. **You want me to zoom in further?**

23 Q. Yes. And will you circle the ant.

24 Thank you, Detective.

25 Detective, you were asked some questions

1 about exhibits 985 through 987, which are the
2 various soil samples that were taken at the scene
3 and then the control samples.

4 Where have those samples been stored?

5 **A. They were at DPS in Flagstaff for a**
6 **while. Once they were returned, they remained in**
7 **our evidence.**

8 **Q.** And you still have those samples today?

9 **A. Yes.**

10 **Q.** And those samples are available for
11 testing?

12 MR. KELLY: Your Honor, objection.

13 THE COURT: Overruled.

14 **Q.** MS. POLK: Those samples are available
15 for testing if anyone wants to test them?

16 **A. Yes.**

17 **Q.** You talked about the -- you were asked
18 questions from Mr. Kelly about the crime scene and
19 the crime scene tape and when it got expanded.
20 Will you clear up for the jury what you know about
21 when crime scene tape was put at the scene and when
22 it was expanded?

23 **A. Yes. I believe there were still**
24 **paramedics on scene actually when the crime scene**
25 **tape was originally put up. And then I was told**

1 **later that night they expanded the crime scene. I**
2 **wasn't there when any of that happened.**

3 **Q.** And did you ever expand the crime scene
4 tape the next day?

5 **A. No.**

6 **Q.** Did you ever, based on your
7 investigation, find any evidence to suggest that
8 the crime scene was contaminated in any way?

9 **A. No.**

10 **Q.** Did you ever find any evidence to suggest
11 that items, relevant items, were missed and not
12 collected?

13 **A. No.**

14 **Q.** You were asked by Mr. Kelly a question
15 about why not just put all of Angel Valley inside
16 crime scene tape. Did you have any evidence to
17 give you that required probable cause to search the
18 entire property of Angel Valley?

19 **A. No.**

20 **Q.** Mr. Kelly questioned you about your
21 conclusion based on your investigation and your
22 conclusion or opinion as the detective that if
23 toxins had been the cause of death, then everyone
24 would have been sick.

25 Do you recall those questions?

1 **A. Yes.**

2 **Q.** Do you recall Dr. Jeanne Armstrong, who
3 testified in this case?

4 **A. Yes.**

5 **Q.** And do you recall her testimony on that
6 very point?

7 **A. Not really.**

8 **Q.** Mr. Kelly asked you questions -- he gave
9 you a theoretical situation where somebody inside
10 the defendant's sweat lodge who had been lying with
11 the face in the dirt for a long period of time. Do
12 you recall whether Liz Neuman was face up or face
13 down?

14 **A. She was face up. She was laying on Laura**
15 **Tucker.**

16 MR. KELLY: Your Honor, objection to the form
17 of the question. Based on a belief.

18 THE COURT: Sustained.

19 **Q.** BY MS. POLK: Based on your
20 investigation, do you have an opinion and a
21 conclusion as to how Liz Neuman -- what was her
22 position inside the sweat lodge, what was her
23 orientation?

24 MR. KELLY: Objection, Your Honor. Form of
25 the question.

1 THE COURT: It really comes down to 602 and
2 knowledge. So sustained.

3 **Q.** BY MS. POLK: You were asked some
4 questions by Mr. Kelly about why you didn't call in
5 various experts or scientists after two months of
6 trial. Have you heard any reason even at this
7 point to call --

8 MR. KELLY: Your Honor, objection. May we
9 approach?

10 THE COURT: Yes.

11 (Sidebar conference.)

12 MR. KELLY: Judge, I move for a mistrial.
13 You've instructed the jury about this before the
14 start. I have the instruction in front of me about
15 the defense's ability to always challenge the
16 sufficiency of the evidence. And the prosecutor
17 continues to go down an improper path. It's
18 repeated. I'd move for a mistrial.

19 Alternatively, Judge, I ask that this
20 instruction be read to the jury right now. We had
21 a question about evidence being available. And now
22 we have a question implying that somehow we had
23 some obligation or this police officer's belief is
24 somehow relevant to a determination that this jury
25 has to make. It's highly improper.

1 THE COURT: Ms. Polk?

2 MS. POLK: Your Honor, it's not improper at
3 all. I don't begin to understand the basis for
4 Mr. Kelly's motion for a mistrial. These are all
5 questions that he asked the witness about in a
6 leading fashion. He says to this witness, you
7 never called an expert. You never called in a
8 scientist.

9 It's an appropriate question to ask this
10 witness, do you have any basis for calling in a
11 scientist or an expert? I produced for the Court
12 previously the two cases. I can find them again if
13 you would like.

14 You can't open doors, attack the
15 detective's investigation, and then not allow
16 appropriate redirect for the detective to explain
17 his actions.

18 THE COURT: Motion for mistrial is denied.
19 And to point out availability of the evidence, the
20 case law permits that. If it's available, that
21 case law supports that can be stated. That's not
22 like commenting on somebody's silence. It's not
23 like that.

24 And the other aspect was all these
25 questions about what -- his investigation, where he

1 went. Again, it has to be clear it's only his
2 belief.

3 Overruled.

4 MR. KELLY: Judge, renewing my motion to read
5 the instruction to the jury.

6 THE COURT: I'm not going to read that at this
7 point.

8 (End of sidebar conference.)

9 THE COURT: Ms. Polk.

10 Q. BY MS. POLK: Detective, with regard to
11 your investigation, you were asked the questions by
12 Mr. Kelly about your ability to call experts or
13 scientists.

14 Do you recall that line of questioning?

15 A. Yes.

16 Q. And based on your opinion and the result
17 of your investigation, to this day do you see
18 reason to call in such experts or scientists?

19 A. No.

20 Q. You were asked questions about Liz
21 Neuman's position -- you were asked a question by
22 Mr. Kelly about the heat inside the defendant's
23 sweat lodge ceremony. And Mr. Kelly asked you a
24 question about, well, why would Liz Neuman be
25 affected and not Laura Tucker?

1 Do you recall that question?

2 MR. KELLY: Your Honor, objection.

3 THE COURT: Overruled.

4 THE WITNESS: Yes.

5 Q. BY MS. POLK: Do you have an opinion,
6 based on your investigation, as to why Liz Neuman
7 was affected and not Laura Tucker?

8 MR. KELLY: Your Honor, objection.

9 THE COURT: Grounds?

10 MR. KELLY: This witness is not qualified.

11 THE COURT: Sustained. Sustained.

12 Q. BY MS. POLK: Mr. Kelly asked you about
13 your ability to submit evidence to a private
14 laboratory to determine air quality.

15 Do you recall that question?

16 A. Yes.

17 Q. In this case would you have been able to
18 submit the air inside the sweat lodge to any lab
19 for testing?

20 A. No.

21 Q. And why not?

22 A. **Because it had been opened up. The air**
23 **was -- whatever air was inside the sweat lodge when**
24 **people got sick, that air was gone.**

25 Q. You were asked some questions by

1 Mr. Kelly about a meeting with the prosecutors on
2 December 14th of 2009.

3 Do you recall those questions?

4 A. Yes.

5 Q. Tell the jury what the purpose of that
6 meeting on December 14th was.

7 A. **The purpose of the meeting was to present**
8 **the case to both Ms. Polk and the county attorney's**
9 **office and also the medical examiners. I only**
10 **wanted to present the case once since it's a pretty**
11 **extensive case. And so I thought that it would be**
12 **good if everybody involved with the case got**
13 **together and we talked about the case. And I was**
14 **also wanting to get information from the medical**
15 **examiners as far as what they had found out. I**
16 **hadn't talked to the medical examiners at that**
17 **point, so I didn't know what they had found out.**

18 Q. I'm going to look at the easel.

19 Detective, this is a chart that Mr. Kelly put
20 together while questioning you.

21 Do you recall that line of questioning?

22 A. Yes.

23 Q. Would you agree that two people died in
24 Mr. Ray's sweat lodge on October 8th of 2009?

25 A. Yes.

1 Q. Would you agree that you began your
2 investigation on October 9th of 2009?

3 A. Yes.

4 Q. Between October 9th in 2009 and the
5 December 14th meeting with the prosecutors and the
6 medical examiners, did you do anything?

7 A. Yes. We interviewed multiple witnesses.

8 Q. Are there some things missing in that
9 chart, then, in terms of your investigation?

10 A. Yes.

11 Q. Do you recall how many witnesses you
12 interviewed between October 9th, 2009, and
13 December 14th?

14 A. At that point early on, we were all doing
15 interviews. All of the detectives that were
16 available were doing interviews on this case. And
17 so I'm not sure how many I did in relation to the
18 total number. I can't tell you how many I did.

19 Q. Detective, at some point were you working
20 exclusively on this investigation?

21 A. Yes.

22 Q. At what point? During that time period
23 between October 9th and December 14th, were you
24 working exclusively on this case?

25 A. Yes.

1 Q. Did you also do the search warrant at
2 James Ray International headquarters in Carlsbad,
3 California, between October 9th and December 14th?

4 A. Yes.

5 Q. Between December 14th and February 3rd
6 of 2010, did you do anything else on the case?

7 A. Yes.

8 Q. What else did you do?

9 A. We continued to interview people and
10 follow evidence and leads as the leads came in.

11 Q. After February 3rd of 2010, did you
12 continue to do your investigation on this case?

13 A. Yes.

14 Q. Do you have any estimate, Detective, as
15 to how many hours you spent simply interviewing
16 people?

17 A. It's definitely in the hundreds.

18 Q. I'm going to put up on the overhead
19 Exhibit 141. I'm going to zoom in. Do you recall
20 when Mr. Kelly showed you this photograph and asked
21 you whether you could agree that was Fawn Foster?

22 A. Yes.

23 Q. Do you recall Mr. Kelly asking you if
24 that was not inconsistent with Fawn Foster's
25 testimony in this trial?

1 A. Yes.

2 Q. Based on your investigation, do you have
3 an opinion whether or not this photograph is
4 inconsistent with Fawn Foster's testimony in this
5 trial?

6 MR. KELLY: Your Honor, objection to the form
7 of the question.

8 THE COURT: Overruled.

9 THE WITNESS: I don't think so.

10 Q. MS. POLK: And why not?

11 MR. KELLY: Your Honor, same objection.

12 THE COURT: Overruled.

13 THE WITNESS: Because I don't remember her
14 saying that she stayed on the log the entire time
15 without getting up. I remember her talking about
16 she had duties. She had to -- there was an
17 intentions fire, and that was causing ashes and
18 things to come up out of the intentions fire. So
19 she was stomping out those ashes. And it sounded
20 like she had some chores and things to do.

21 And then later on she said that she was
22 on that log watching the sweat lodge for most of
23 the time except for when she went to go get ice for
24 Lou Caci.

25 Q. Detective, do you recall the

1 demonstration by Mr. Kelly here in the courtroom
2 about the size of the sweat lodge?

3 A. Yes.

4 Q. And do you recall questions from
5 Mr. Kelly about where Fawn Foster was sitting on a
6 log with respect to the sweat lodge?

7 A. Yes.

8 Q. When Mr. Kelly did his demonstration for
9 the jury about where Fawn Foster was, where I'm
10 standing was the center of the sweat lodge? Would
11 you agree with that?

12 A. Yes.

13 Q. In other words, Mr. Kelly's demonstration
14 in the court had this podium as the center of the
15 sweat lodge?

16 A. Yes.

17 Q. When Fawn Foster was sitting on the log,
18 would that fairly represent the distance between
19 her and Mr. Ray?

20 MR. KELLY: Objection, Your Honor.

21 THE COURT: Sustained.

22 Q. BY MS. POLK: What part of the sweat
23 lodge did Mr. Ray -- based on your investigation,
24 do you have an opinion as to what part of the sweat
25 lodge Mr. Ray sat in?

1 **A. Yes.**

2 MR. KELLY: Your Honor, objection. Form of
3 the question. Eliciting an improper opinion from a
4 nonexpert.

5 THE COURT: Overruled.

6 You may answer that.

7 THE WITNESS: Yes.

8 **Q. BY MS. POLK: What is your conclusion?**

9 **A. He, Mr. Ray, was sitting next to the**
10 **door.**

11 **Q. And in Mr. Kelly's demonstration for the**
12 **jury, is where I'm standing here at the podium --**
13 **is that where the door was?**

14 MR. KELLY: Your Honor, objection.

15 THE COURT: Overruled.

16 You can answer that.

17 THE WITNESS: No.

18 **Q. BY MS. POLK: Where would the door be?**

19 **A. The door was on the edge of the sweat**
20 **lodge.**

21 **Q. Out further this way, if the door were to**
22 **come this direction?**

23 **A. Yes.**

24 **Q. Do you recall when Mr Kelly asked you if**
25 **the fact that lawsuits had been filed affected your**

1 assessment of the credibility of the Hamiltons and
2 other witnesses?

3 **A. Yes.**

4 **Q. Are you aware, Detective, of any lawsuits**
5 **filed against Debby Mercer based on the events that**
6 **occurred on October 8th of 2009?**

7 **A. There were no lawsuits.**

8 **Q. And are you aware whether Debby Mercer**
9 **filed any lawsuits against anyone based on those**
10 **events?**

11 **A. She did not.**

12 MR. KELLY: Your Honor, object based on our
13 previous discussion as to form.

14 THE COURT: Sustained.

15 **Q. BY MS. POLK: Do you recall when**
16 **Mr. Kelly asked you whether the spiritual beliefs**
17 **of Fawn Foster and the Hamiltons affected your**
18 **assessment of their credibility, including their**
19 **belief in communicating with animals?**

20 MR. KELLY: Your Honor, objection. Request
21 the question be stricken.

22 THE COURT: I'm sustaining as to the form of
23 that question. Objection sustained.

24 **Q. BY MS. POLK: Detective, during your**
25 **years as a detective and a peace officer, have you**

1 encountered people with belief systems that are
2 different from yours?

3 **A. Yes.**

4 MR. KELLY: Objection, Your Honor. Relevance.

5 THE COURT: Overruled.

6 THE WITNESS: Yes.

7 **Q. BY MS. POLK: And do those different**
8 **belief systems affect how you assess a person's**
9 **credibility?**

10 **A. No.**

11 **Q. When you are conducting interviews of**
12 **witnesses in a case, do you assess the credibility**
13 **of a witness?**

14 **A. Yes.**

15 **Q. And how do you assess the credibility of**
16 **witnesses in connection with your investigation?**

17 **A. There's different reasons. For instance,**
18 **if they're willing just to talk to us, their motive**
19 **for talking to us, their motive for not talking to**
20 **us, whether or not their statements match what**
21 **other witnesses saw, their body language, those**
22 **sorts of things.**

23 **Q. And how about physical evidence found at**
24 **a scene? Does that play a role in your assessment**
25 **of a witness's credibility?**

1 **A. Yes.**

2 **Q. How so?**

3 **A. Well, if the physical evidence matches**
4 **what the witness was telling us, then there is more**
5 **likelihood that the witness is credible.**

6 **Q. You mentioned that one thing you look at**
7 **is willingness to answer questions or a witness's**
8 **cooperation. Were the Hamiltons cooperative with**
9 **you?**

10 **A. Yes.**

11 **Q. Was there ever a time when the Hamiltons**
12 **were not cooperative with you?**

13 **A. No.**

14 **Q. I'm going to put up Exhibit 579. Do you**
15 **recognize what this is?**

16 **A. I do.**

17 **Q. What is it?**

18 **A. That's the area of the sweat lodge**
19 **that -- after the memorial ceremony.**

20 **Q. Do you recall the question from Mr. Kelly**
21 **asking you whether the Hamiltons cleared the site**
22 **right after the deaths of the three victims?**

23 **A. Yes.**

24 **Q. Detective, what is your understanding as**
25 **to the area that was cleaned up?**

1 MR. KELLY: Your Honor, objection. Rule 701.
 2 That's hearsay.
 3 THE COURT: Sustained.
 4 Q. BY MS. POLK: What do you understand this
 5 photograph to be of, Detective?
 6 A. **That's the area where the sweat lodge had**
 7 **been.**
 8 Q. And today what do you understand it to
 9 be?
 10 A. **A circle of rocks with a heart in the**
 11 **middle.**
 12 Q. Do you understand it to be a memorial --
 13 MR. KELLY: Your Honor, objection. Leading.
 14 THE COURT: Overruled.
 15 You may answer that.
 16 THE WITNESS: Yes. That's the purpose of the
 17 design.
 18 Q. BY MS. POLK: And would you expect to see
 19 the wood -- I'm going to put up Exhibit 145, for
 20 example.
 21 Would you expect to see rocks and the
 22 wood that was over to the side at the site of the
 23 memorial today?
 24 MR. KELLY: Your Honor, objection.
 25 Speculative.

1 THE COURT: Sustained.
 2 Q. BY MS. POLK: You were asked questions
 3 about your meeting with the Hamiltons on March 21st
 4 of this year after trial started.
 5 Do you recall that line of questioning?
 6 A. **Yes.**
 7 Q. Did you contact the Hamiltons after the
 8 trial started?
 9 A. **Yes.**
 10 Q. And for what purpose?
 11 A. **I wanted to see if Michael Hamilton had**
 12 **documentation as far as where he got the logs for**
 13 **the log homes that he built at Angel Valley and**
 14 **also the logs that were used to heat the rocks in**
 15 **the sweat lodge, to see if he had documentation**
 16 **whether or not those logs had been treated with any**
 17 **kind of chemicals.**
 18 Q. And subsequently the Hamiltons came in
 19 and met person-to-person with you?
 20 A. **Yes.**
 21 Q. Were they cooperative during that
 22 meeting?
 23 A. **Yes.**
 24 Q. And during that meeting did you receive
 25 that documentation indicating that --

1 MR. KELLY: Your Honor, objection. Form of
 2 the question.
 3 THE COURT: Overruled.
 4 You may complete the question.
 5 Q. BY MS. POLK: Did you receive
 6 documentation from the Hamiltons in that meeting
 7 indicating that the --
 8 MR. KELLY: Your Honor, objection. Hearsay.
 9 THE COURT: Sustained.
 10 Q. BY MS. POLK: Did you receive
 11 documentation from the Hamiltons in that meeting?
 12 A. **No. That was later.**
 13 Q. When did you -- did you later receive
 14 documentation from the Hamiltons?
 15 A. **Yes.**
 16 Q. And when was that?
 17 A. **I think it was a few days later.**
 18 Q. Detective, I'm going to approach and show
 19 you what's been marked as Exhibit 794. If you will
 20 just take a moment to look at it.
 21 A. **Yes.**
 22 Q. What do you recognize that to be --
 23 MR. KELLY: Your Honor, I would object and
 24 request the Court to review 794.
 25 THE COURT: It's based on this. Then the

1 objection is?
 2 MR. KELLY: It's requesting a hearsay
 3 response.
 4 THE COURT: Sustained just based on what I'm
 5 reviewing.
 6 MS. POLK: Your Honor, without going into what
 7 the document is, I'd like to establish this is the
 8 documentation he received.
 9 THE COURT: As a foundational predicate at
 10 this time?
 11 MS. POLK: Yes.
 12 THE COURT: Okay.
 13 Mr. Kelly, any objection -- I'm not going
 14 to admit it as an exhibit. But because this
 15 witness is on the stand now --
 16 MR. KELLY: Judge, he's testified he received
 17 the document. The contents would be hearsay.
 18 THE COURT: Yes. That's been sustained.
 19 Well, okay. There is a record of that number --
 20 MS. POLK: It's Exhibit 794, Your Honor.
 21 THE COURT: 794. There's some basic
 22 foundation evidence that's been provided.
 23 Q. BY MS. POLK: And this is the -- document
 24 794 is the documentation you received from the
 25 Hamiltons, Detective?

1 A. Yes.

2 Q. During that meeting with the Hamiltons,
3 did you discuss with them the issue of whether the
4 wood used to heat the rocks for Mr. Ray's sweat
5 lodge ceremony had ever been treated?

6 A. Yes.

7 Q. You were also asked some questions about
8 that meeting with the Hamiltons and whether the
9 issue of rat poison was discussed. Do you recall
10 those questions?

11 A. Yes.

12 Q. With regard to the issue of poisons at
13 Angel Valley, what year was your conversation with
14 the Hamiltons focused on?

15 A. It was 2009.

16 Q. And during that meeting did you also talk
17 to the Hamiltons about their policy in general with
18 respect to the use of chemicals on their property?

19 A. Yes.

20 Q. You made a report from that meeting and
21 provided it to the parties?

22 A. Yes.

23 Q. And you testified a few moments ago that
24 in assessing the credibility of witnesses, that one
25 of the things you look at is whether statements are

1 consistent and whether they match physical evidence
2 found at the scene?

3 A. Right.

4 Q. Were you able to assess the information
5 provided to you by the Hamiltons with regard to the
6 wood used?

7 A. Yes.

8 Q. And also with regard to the use of
9 insecticides or pesticides on the property?

10 A. Yes.

11 Q. And what was your assessment?

12 MR. KELLY: Your Honor, objection.

13 Credibility is solely in the province of the jury.

14 THE COURT: Sustained.

15 Q. BY MS. POLK: Did the Hamiltons come
16 voluntarily to that meeting on March 21st, 2009?

17 A. Yes. And it wasn't really a meeting. I
18 thought the Hamiltons were bringing me the
19 documentation that we talked about. I thought
20 that's why they were coming into my office. And
21 then we got to talking while they there.

22 Q. Did you conduct an investigation to
23 verify or confirm the information provided to you
24 by the Hamiltons regarding their policy about use
25 of chemicals at Angel Valley?

1 A. Not really.

2 Q. Have you compared the information that
3 they gave you to the information provided by other
4 witnesses?

5 A. Yes.

6 Q. And what other witnesses?

7 A. It would be Ted Mercer, Debra Mercer, and
8 Fawn Foster.

9 Q. You testified that in assessing
10 credibility of a witness, you look for independent
11 evidence that verifies or confirms information
12 given?

13 MR. KELLY: Your Honor, objection to the form
14 the question. It's leading.

15 THE COURT: Overruled at this point.

16 You may complete the question, Ms. Polk.

17 Q. BY MS. POLK: With regard to the theory
18 that some toxin or other chemical caused the death
19 of the three victims on October 8th of 2009, have
20 you examined the evidence at the scene?

21 A. Yes.

22 MR. KELLY: Your Honor, I object to the form
23 of that question in regards to the theory. Ask
24 that the question and the answer be stricken and
25 ask that the prior jury instruction be provided to

1 the jury at this time.

2 THE COURT: The objection is sustained in that
3 the question should be disregarded. You may ask
4 another question, Ms. Polk.

5 Q. BY MS. POLK: With regard to the
6 possibility that some toxin or chemical caused the
7 deaths of the three victim on October 8th, 2009,
8 have you examined the evidence at the scene?

9 A. Yes.

10 Q. Specifically what did you find or not
11 find?

12 A. I did not see anything in the sweat lodge
13 that I thought was rat poison or any kind of
14 poison, for that matter. I've used AMDRO. I know
15 what it looks like. And there wasn't any AMDRO
16 inside the sweat lodge. There wasn't any rat
17 pellets, rat poison pellets, inside the sweat
18 lodge. There wasn't any bug spray that I saw
19 anywhere. There wasn't any other kind of herbicide
20 or any kind of poison anywhere on the property that
21 I saw.

22 Q. How about odors?

23 A. No. No odor.

24 Q. Are you familiar with what happens if
25 somebody accidentally swallows insecticide, for

1 example?

2 MR. KELLY: Your Honor, objection. Lack of
3 foundation.

4 THE COURT: That's a yes or no response, if
5 you can do that.

6 THE WITNESS: Well, I've learned since --

7 MR. KELLY: Your Honor --

8 THE COURT: If you can answer that --

9 Q. BY MS. POLK: Just yes or no. Are you
10 familiar with what would happen to a person if they
11 accidentally swallowed some mosquito repellant?

12 THE COURT: On second thought, sustained on
13 foundation. Sustained.

14 Q. BY MS. POLK: Did your investigation,
15 Detective, indicate that anybody had ingested --
16 that any of the three victims had ingested any sort
17 of insecticide or pesticide?

18 MR. KELLY: Your Honor, objection. Form of
19 the question, lack of foundation.

20 THE COURT: Sustained.

21 Q. BY MS. POLK: Detective, I'm going to put
22 up on the overhead Exhibit 412. Do you recall the
23 question from Mr. Kelly stating that Ted Mercer had
24 said he burned the wrong wood?

25 A. Yes.

1 Q. Did Ted Mercer ever tell you -- did he
2 ever use those words? Did he ever say he had
3 burned the wrong wood?

4 A. No.

5 Q. What did he tell you?

6 A. **He speculated that maybe -- I was asking**
7 **him what was different about 2009 as opposed to the**
8 **other sweat lodges held at Angel Valley. He said**
9 **that in 2009 they used these D logs exclusively.**
10 **And in previous years they used the D logs mixed in**
11 **with what he called "tree wood," which was branches**
12 **and things like that.**

13 Q. Mr. Kelly asked you about some of the
14 ends of these D logs and asked you whether you
15 thought those could be different oils on the
16 D logs.

17 Do you recall those question?

18 MR. KELLY: Your Honor, object to the form of
19 the question. Ask him why he took it. It's a
20 sample.

21 THE COURT: Again, with this kind of question,
22 if you can answer that, it's a correct premise, you
23 may.

24 THE WITNESS: Can you ask it one more time.

25 Q. BY MS. POLK: Do you recall a question

1 from Mr. Kelly saying how do you know that this is
2 not oil -- some kind of oil on these D logs?

3 A. Yes.

4 Q. And do you know whether or not there is
5 oil or what -- let me ask you this: Based on your
6 presence at the scene, your investigation, do you
7 have an opinion as to why there is a difference in
8 color on some of these ends of the D logs?

9 A. Yes.

10 MR. KELLY: Your Honor, object. Again, 701.

11 THE COURT: Sustained.

12 Q. BY MS. POLK: Did you see the end of
13 those D logs?

14 A. Yes.

15 Q. And did you form a conclusion as to
16 whether there was an explanation for why there's
17 different colors?

18 A. Yes.

19 MR. KELLY: Your Honor, objection. Form of
20 the question.

21 THE COURT: As to foundation.

22 Q. BY MS. POLK: Detective, this is a yes or
23 no. Do you have an opinion as to why some of these
24 logs have a different coloration at the ends of
25 them?

1 A. Yes.

2 MR. KELLY: Objection.

3 THE COURT: I know it called for yes or no.
4 It's sustained as to foundation.

5 MS. POLK: The question was yes or no.

6 THE COURT: I understand. I'm sustaining the
7 objection as to foundation. There hasn't been
8 foundation provided.

9 Q. BY MS. POLK: What is the basis -- what
10 would be your training or experience, Detective,
11 that would allow you -- or upon which you formed
12 opinion as to the colors at the ends of the D logs?

13 MR. KELLY: Judge, I would object again. This
14 witness lacks foundation, Rule 701. He's a lay
15 witness. He should not be providing opinions.

16 THE COURT: Well, overruled.

17 You may answer that.

18 THE WITNESS: I've done a lot of woodworking
19 and staining wood and building houses. And I know
20 what wood looks like when it's been weathered and
21 out in the weather. I also know what it looks like
22 if it's been stained or preservatives used.

23 Q. Did you see any evidence of stain or
24 preservatives on these D logs when you were out at
25 the scene?

1 **A. No.**
 2 **Q.** Mr. Kelly asked you about
 3 pressure-treated wood at the scene. Did you see
 4 some?
 5 **A. I did.**
 6 **Q.** I'm going to put back up on the overhead
 7 Exhibit 141 and ask you to direct the jury's
 8 attention to the area where you saw some
 9 pressure-treated wood.
 10 **A. Yes. There's several stacks of D logs in**
 11 **this area where there appear to be the lumber**
 12 **storage area. And that's where I interviewed**
 13 **Mr. Mercer. In fact, he was sitting on that lumber**
 14 **pile while I interviewed him. And in that lumber**
 15 **pile, I could see a piece of pressure-treated wood.**
 16 **Q.** And how much pressure-treated wood did
 17 you see in the area of the lumber?
 18 **A. I only remember seeing the one piece.**
 19 **Q.** How big of a piece was it?
 20 **A. I believe it was a 2-by-6, but I don't**
 21 **remember how long.**
 22 **Q.** Did you see any pressure wood down at the
 23 area of the sweat lodge itself?
 24 **A. No.**
 25 **Q.** Let me put back up on the overhead

1 Exhibit 512. Mr. Kelly asked you about this pile
 2 of scrap wood that's down here and why you did not
 3 seize it. Did you see any pressure-treated wood in
 4 that stack?
 5 **A. No.**
 6 **Q.** Have you -- can I ask you whether or not
 7 you have the training and experience to tell the
 8 jury whether plywood -- is there such a thing as
 9 pressure-treated plywood?
 10 MR. KELLY: Your Honor, this is highly
 11 improper.
 12 THE COURT: Sustained as to foundation.
 13 **Q.** BY MS. POLK: Do you know, Detective,
 14 based on your training and experience, whether or
 15 not there's such a thing as pressure-treated
 16 plywood?
 17 **A. Yes.**
 18 **Q.** Is there?
 19 **A. No.**
 20 MR. KELLY: Your Honor, objection. Lack of
 21 foundation. He's a detective.
 22 THE COURT: The foundation is not provided.
 23 You know, we talked about distinctions between 701
 24 and 702. But there is insufficient foundation.
 25 The question and the answer stricken.

1 **Q.** BY MS. POLK: Detective, why did you not
 2 seize any of this wood?
 3 MR. KELLY: Your Honor, asked and answered.
 4 THE COURT: Overruled.
 5 THE WITNESS: Because it wasn't used.
 6 MR. KELLY: Your Honor, objection. Ask that
 7 it be stricken.
 8 THE COURT: Sustained. Answer is stricken.
 9 **Q.** BY MS. POLK: Detective, based on the
 10 results of your investigation, did you determine
 11 whether or not there was reason to seize any of
 12 this wood? That's yes or no.
 13 MR. KELLY: Objection. Asked and answered.
 14 THE COURT: Sustained.
 15 **Q.** BY MS. POLK: Detective, I'm going to put
 16 up on the overhead Exhibit 345, which is the lab
 17 report from the Department of Public Safety Crime
 18 Lab. And I can actually bring it to you if you
 19 need to see it.
 20 Can you tell the jury -- Exhibit 305
 21 says, one rock. Can you tell the jury where that
 22 rock came from? And if you need to look at your
 23 report, you can.
 24 **A. Yeah. The rock, item No. 305, was taken**
 25 **from the pit outside the sweat lodge.**

1 **Q.** And how about item 345?
 2 **A. That one was taken from inside the sweat**
 3 **lodge.**
 4 **Q.** And then item 356, can containing pieces
 5 of material; and item 358, can containing pieces of
 6 material. What are those?
 7 **A. Those are the paint cans that had the**
 8 **crosscut sections of the different layers of tarps**
 9 **and blankets.**
 10 **Q.** Item 500. What was that? Says, can
 11 containing wood.
 12 **A. That was one of the samples taken from**
 13 **either the kiva or the D log. And I'll have to**
 14 **look at my evidence log to be sure.**
 15 **Q.** Okay. Why don't you do that.
 16 **A. Yes. No. 500 was a sample taken from**
 17 **item 300, which was the D log that was all the way**
 18 **to the right in the picture of the wood pile.**
 19 **Q.** And then item 502?
 20 **A. 502 was a sample of item 302, which was a**
 21 **D log that was second from the end on the left.**
 22 **Q.** In that stack of lumber?
 23 **A. Yes.**
 24 **Q.** What was item 562?
 25 **A. 562 was a sample taken from one of the**

1 **uprights in the center of the sweat lodge.**

2 Q. The frame of the sweat lodge?

3 A. Yes.

4 Q. And what was item 564?

5 A. **It was the same thing from a different**
6 **stick inside the sweat lodge.**

7 Q. And when you say, "sample," did the
8 entire upright willow branch go to the DPS crime
9 lab?

10 A. No.

11 Q. Just samples of the various items?

12 A. Yes.

13 Q. The entire rock went?

14 A. Yes.

15 Q. And then the -- all four crosscuts of the
16 materials of the sweat lodge went?

17 A. Yes.

18 Q. Detective, do you see on the report where
19 it says that all of those items that we just talked
20 about were heated for eight hours?

21 A. Yes.

22 Q. At 50 degrees celsius?

23 A. **Yes. Which is around 122 degrees**
24 **Fahrenheit.**

25 Q. Do you have any evidence that anybody was

1 inside the sweat lodge for eight hours?

2 A. No.

3 Q. And when those tests were done, the only
4 thing that reacted was one of the two crosscut
5 materials?

6 A. Yes.

7 Q. We'll flip to the next page. And that
8 would be right here, item No. 356?

9 A. Yes.

10 Q. And then with respect to the D log, was
11 something detected?

12 A. Yes.

13 Q. And that was what?

14 A. **It was alpha-terpineol.**

15 Q. Were you ever able in this investigation
16 to determine what the temperature inside Mr. Ray's
17 sweat lodge was?

18 A. No.

19 Q. Were you ever able to determine how humid
20 it got?

21 A. **We weren't able to get a specific**
22 **percentage of humidity. But it was extremely**
23 **humid.**

24 Q. With regard to the crosscuts, the samples
25 of the tarp, the samples of the covering for the

1 sweat lodge, based on your investigation, did you
2 form an opinion as to whether or not any tarp or
3 plastic material was on the inside of the sweat
4 lodge?

5 A. Yes.

6 MR. KELLY: Your Honor, I'm going to object
7 again to the word "opinion." His personal
8 knowledge is one thing.

9 THE COURT: Ladies and gentlemen, we're going
10 to go ahead and take a recess at this time. Please
11 remember the admonition. Please be reassembled in
12 15 minutes. We'll start as soon as we can after
13 that.

14 Detective, you may step down.

15 The parties will remain.

16 (Proceedings continued outside presence
17 of jury.)

18 THE COURT: Mr. Kelly, I think you made your
19 objection.

20 MR. KELLY: I did, Judge. What I would like
21 to add is two things. One is beginning with the
22 very first witness, Melissa Phillips, I expressed a
23 concern with regard to the form of the questions
24 used on redirect. I will suggest, Judge, they're
25 highly improper. They always suggest the answer

1 instead of just asking, did you look at item 356,
2 what did you observe, in a nonleading fashion.

3 That's the proper question-and-answer
4 format to redirect to rehabilitate a witness in
5 particular areas identified during cross.

6 This repeated leading of the witness,
7 Judge, I would emphasize you consider it as
8 improper. More importantly, Judge, the repeated
9 use of the words "conclusion" and "opinion" was
10 discussed on Friday. Instructions were provided to
11 the State of Arizona not to use those terms; were
12 provided to the witness, Detective Diskin, not to
13 respond in that fashion; that we would use the term
14 "belief" as it directed his investigation. Because
15 it is highly improper, given Rule 701, 702, and
16 403.

17 Finally, Judge, and most importantly, I
18 would again ask this Court to consider giving the
19 Brady instruction at the conclusion of this
20 witness's testimony. Today is the time that that
21 instruction has meaning to this jury after hearing
22 from Detective Diskin.

23 If we wait another two or three weeks, it
24 will be taken out of context. There will not be
25 another witness to discuss the Brady violation.

1 Thus, I would again ask the Court to provide an
2 instruction after Detective Diskin's testimony,
3 before the next witness, relating to the Brady
4 violation. And I believe we have submitted a
5 proposed instruction in that regard.

6 THE COURT: Ms. Polk, I want to address the
7 detective's testimony first.

8 When there are cross-examination
9 questions that go to the investigation, there can
10 be some testimony about explanations, why things
11 were done. But before I go further, if you would
12 like to respond to Mr. Kelly's objection and
13 request.

14 MS. POLK: Your Honor, these questions are not
15 improper. The state is allowed to focus a
16 question. They're not leading questions if I say,
17 did you form an opinion as to how the vinyl -- I
18 think my last question had to do with the crosscuts
19 and whether or not the vinyl was on the inside.

20 We had talked about it last week. My
21 belief was that the Court had directed me to make
22 sure that the jury understood this was his opinion.
23 Now Mr. Kelly is saying the jury needs to hear that
24 this is his belief as opposed to his opinion.

25 I don't have a problem using the word

1 "belief" instead of opinion. My recollection from
2 last week was specifically that I was to make it
3 clear through the question of witness that this was
4 his opinion based on the investigation.

5 THE COURT: Well, as we know from 602,
6 witnesses can testify generally about what they
7 actually have direct personal knowledge of. As a
8 means of not having repeated limiting instructions,
9 I think that was part of why Mr. Kelly just
10 suggested this.

11 If it was clear that this was just a
12 belief so that the jury knows he wasn't there,
13 there is no scientific way that he's privy to, that
14 people aren't aware of, that would give him a way
15 to determine these things, that it could proceed.

16 But repeated questions, was it your
17 conclusion and opinion, as if -- this was all put
18 together, and there it is; when, in fact, his
19 opinion and conclusions are based on the people he
20 has talked to. These people have testified about
21 the layer.

22 And it's -- it just goes beyond his
23 opinions and conclusions. And it's just a way of
24 funneling through how he has put together what
25 people have told him. So it's not directly hearsay

1 to him. But as far as the jury is concerned, it's
2 just hearsay knowledge.

3 I think Mr. Kelly is still saying, if
4 it's clear that it's just his belief from this
5 investigation, then that might short circuit the
6 basic problem. I've just never had this come up.
7 In trial the last a week, the number of
8 objections -- just in general, the number of
9 objections in this trial.

10 MR. KELLY: Judge --

11 THE COURT: So it's -- no. Putting an
12 investigation together where he just funnels
13 through his hearsay and his conclusions, all the
14 way up to where I think somebody is guilty, that's
15 not what officers can testify to.

16 MS. POLK: Your Honor, every area that I'm
17 questioning this witness on was raised by Mr. Kelly
18 in his cross-examination over -- from time to time,
19 over my objections, including questions of this
20 detective whether or not he heard testimony from
21 Fawn Foster or from the Hamiltons or from the
22 Mercers or from other witnesses in getting him to
23 agree with Mr. Kelly that a witness had testified
24 in such a fashion. And I repeatedly objected to
25 that.

1 Every single area that I'm questioning
2 this detective on are areas that were raised by
3 Mr. Kelly and questions suggesting you didn't test
4 this or you reached the wrong conclusion. I'm
5 going to areas that Mr. Kelly raised in having this
6 witness explain what he did or did not do.

7 THE COURT: The questions have to do with
8 either his observations or making clear that this
9 is just his belief and that's why he did what he
10 did, stating in particular form of these answers.

11 MS. POLK: Your Honor, Mr. Kelly, with his lab
12 report from DPS, even though there's a witness
13 coming in from DPS, spend a lot of time on this lab
14 report and what these results meant, and asking him
15 to -- with a little drawing at the end, asking him
16 to agree that what he's seeing in this lab report
17 would be consistent with what's in medical records.

18 All areas that I was objecting to, that I
19 have a right now to go back in and explore what
20 this detective knew and what his conclusions were
21 based on his investigation. These are all areas
22 raised by Mr. Kelly, and then he objects to them
23 when I want to go back to them on redirect. It's
24 an appropriate area for redirect.

25 MR. KELLY: Judge --

1 THE COURT: Part of this may be semantics in
2 using "conclusion."

3 Mr. Kelly?

4 MR. KELLY: Two things. One is the form of
5 the question, which leads the witness to the
6 response. The second is providing opinion
7 testimony, which is specifically precluded by the
8 rules of evidence.

9 Because a police officer -- jurors
10 provide additional weight to the testimony of a
11 police officer. And for him to get up and say,
12 well, you know, we didn't do this because, in my
13 opinion, it wasn't necessary, that's highly
14 improper.

15 And what I pointed out -- of course, the
16 record speaks for itself. The very first question
17 was, did you know what 2-ethyl-1-hexanol was? He
18 said no.

19 So the proper question on redirect would
20 be -- you know -- why didn't you look at the lab
21 report? Why didn't you consider the results in the
22 lab report? And if his answer was because I didn't
23 know what 2-ethanol-1-hexanol was, and I didn't
24 think it was important, that's his answer.

25 But now to lead him into where the

1 prosecutor wants to go to try to sew up that gap in
2 their case is improper.

3 I asked the prosecutor to ask nonleading,
4 proper questions on redirect, and I asked the
5 witness not to provide a conclusion. He stated in
6 a response -- despite your admonition last week
7 when the question was, why didn't you take a sample
8 of that small pile of wood, the detective's
9 response was, well mit wasn't used in the fire.

10 That's highly improper. He doesn't know
11 that. He has no personal knowledge. That points
12 out the basis of my objection to the line of
13 questioning. It's not asking questions to
14 rehabilitate on redirect. That's fine. It's the
15 form of the question and then these conclusionary
16 and opinion responses from a witness without
17 foundation.

18 To ask him whether or not a piece of wood
19 has been treated, that is something that a
20 laboratory has to determine. You can't look at a
21 piece of wood and determine how it's been treated.
22 And yet he's just willing to provide his -- or he's
23 just giving opinions, over here to the jury, that
24 could be misconstrued. That's my concern, Judge.
25 That's why I think 403 is also a part of this.

1 MS. POLK: Your Honor, again, these
2 questions -- these are all doors opened by
3 Mr. Kelly. You can't expect to go after a witness,
4 attack him for the quality of his investigation,
5 and then not give him an opportunity to explain
6 what his reasons were for what he did.

7 Mr. Kelly opened lots of doors but then
8 thinks the state ought not to be able to go back in
9 and have this witness explain his actions.

10 My questions are not leading, and they
11 are not improper. Last week I believed that the
12 Court directed me to use the term "opinion,"
13 pursuant to Rule 602. I can use the word "belief,"
14 if you formed a belief, if that's what Court and
15 counsel want. But under Rule 602 this is a
16 witness, and these are his opinions based on his
17 investigation.

18 THE COURT: Well, that's the thing. The
19 investigation is being questioned, and then his
20 ability to explain why he did something is a
21 legitimate area of examination. The only way to do
22 this is question by question. And I just have to
23 listen to it and decide if it's a 701, 702.

24 For example, if someone works around
25 lumber a lot and looks at the end of lumber and

1 knows that it's in the weather, so it ages, and is
2 aware of that, that's not necessarily an expert
3 thing. Whether or not it's been treated in
4 addition -- it may get to that or raise a lot of
5 these kinds of 701, 702 distinctions.

6 The use of the word -- because you
7 concluded and it's your opinion that that wasn't
8 necessary, that's why something was done -- I guess
9 the other way to do it is just some kind of
10 limiting instruction. Because when the
11 investigation is being challenged, the witness has
12 to be able to offer an explanation.

13 And we need to take some recess.

14 MS. POLK: Your Honor, I do have one other
15 issue. I can -- just quickly. Exhibit 794, which
16 is the documentation the detective obtained after
17 the March 21st meeting with the Hamiltons -- this
18 is being offered not to prove the truth of the
19 matter asserted. But the defense has raised the
20 claim of recent fabrication by the Hamiltons about
21 the issue of chemicals on their property.

22 This is the documentation that the
23 witness obtained, and I'm offering it to prove not
24 the truth of the matter asserted, but to rebut this
25 suggestion of recent fabrication by the defense

1 that the Hamiltons simply are making up this
2 information about their wood.

3 MR. KELLY: Judge, that's just flat wrong. I
4 think they're making up the information about the
5 wood, and I think they're making up their
6 affidavit. It's hearsay.

7 If they want to bring in a log
8 manufacture and lay the foundation for that
9 particular wood, which is now gone -- but the
10 D logs that were on the property on October 8th,
11 2009. And can lay the foundation from a log
12 manufacturer that that wood was not treated, that's
13 permissible. But to submit an affidavit that
14 purportedly is true is hearsay, and it may be a
15 fabrication.

16 THE COURT: Once again, that has to do with a
17 particular prior statement. We're not dealing with
18 a prior statement. So it's hearsay.

19 Thank you.

20 (Recess.)

21 (Proceedings continued in the presence of
22 jury.)

23 THE COURT: The record will show the presence
24 of Mr. Ray, the attorneys, the jury, and
25 Detective Diskin.

1 Ms. Polk?

2 MS. POLK: Thank you, Your Honor.

3 Q. Detective, when we took the break, we
4 were looking at Exhibit 345, the result from the
5 state crime lab. And I had just asked you a
6 question about the crosscut of materials that
7 formed the outside of the sweat lodge in which
8 three deaths occurred.

9 A. Yes.

10 Q. You collected the four crosscuts at the
11 scene?

12 A. Yes.

13 Q. Did you have the opportunity to examine
14 those materials?

15 A. Yes.

16 Q. And can you tell the jury whether any
17 tarps or plastics were on the inside of the sweat
18 lodge.

19 A. **There were no tarps or plastics on the**
20 **inside.**

21 Q. Do you know, Detective, whether the
22 entire crosscut was tested as one unit by the state
23 crime lab?

24 A. Yes.

25 Q. Do you know why?

1 MR. KELLY: Your Honor, objection. Lack of
2 foundation.

3 THE COURT: Sustained.

4 Q. BY MS. POLK: Detective, are you familiar
5 with what happens to vinyl or plastic in the summer
6 heat in Phoenix?

7 A. Yes.

8 Q. And what happens?

9 A. **It gets hot.**

10 Q. Do you know if it gets hot to the touch?

11 A. Yes.

12 Q. In your investigation did you ever
13 uncover any evidence upon which you formed a belief
14 as to whether or not the materials got hot during
15 Mr. Ray's sweat lodge ceremony?

16 A. Yes.

17 Q. And what is that belief?

18 A. **That the tarps did not get hot.**

19 Q. Looking again at the report from the DPS
20 crime lab, the second page, the same items that we
21 just reviewed with the jury underwent a second set
22 of tests?

23 A. Yes.

24 Q. And at what temperature was the second
25 set of tests performed?

1 A. **At 95 degrees celsius, which I believe is**
2 **203 degrees Fahrenheit.**

3 Q. For what length of time?

4 A. **For eight hours.**

5 Q. In your investigation did you ever
6 determine what length of time participants were
7 inside Mr. Ray's sweat lodge?

8 A. Yes.

9 Q. And what length of time was that?

10 A. **Between two and two and a half hours.**

11 Q. Did you form a belief, Detective, as to
12 whether or not the temperature inside Mr. Ray's
13 sweat lodge ever reached 203 degrees Fahrenheit?

14 A. Yes.

15 Q. And what is that belief?

16 A. **That it did not get that hot.**

17 Q. Do you know what the boiling point of
18 water is at sea level?

19 MR. KELLY: Your Honor, objection. I'll
20 withdraw the objection.

21 THE COURT: If you know that, you may answer.

22 THE WITNESS: Yes.

23 Q. BY MS. POLK: What is it?

24 A. **I believe it's 212 degrees.**

25 Q. Did you have a discussion with the

1 criminalist at the Arizona Department of Public
2 Safety crime lab about whether or not the materials
3 would give off volatiles when tested?

4 **A. Yes.**

5 MR. KELLY: Objection if it's going to request
6 a hearsay response.

7 THE COURT: Sustained on that basis.

8 **Q.** BY MS. POLK: Did you have a belief,
9 Detective, at the time these materials were tested,
10 as to whether or not they would give off volatiles
11 when heated to these temperatures?

12 MR. KELLY: Your Honor, objection. Lack of
13 foundation.

14 THE COURT: Sustained.

15 **Q.** BY MS. POLK: Were you surprised with the
16 results from the state crime lab, Detective?

17 **A. No.**

18 MR. KELLY: Your Honor, objection. Relevance.

19 THE COURT: Sustained.

20 **Q.** BY MS. POLK: Detective, I want to direct
21 your attention to the easel. And do you remember
22 during your cross-examination by Mr. Kelly when he
23 wrote what is on the easel?

24 **A. Yes.**

25 **Q.** Do you recall the question from

1 Mr. Kelly, are you aware that Ms. Sy provided an
2 analysis of Exhibit 356 and found trace evidence of
3 2-ethyl-1-hexanol?

4 **A. Yes.**

5 **Q.** First of all, Detective, does the report
6 marked Exhibit 345 use the word trace evidence?

7 **A. No. It says, trace amounts.**

8 **Q.** Do you know what trace evidence is?

9 **A. Yes.**

10 **Q.** Will you tell the jury what --

11 MR. KELLY: Your Honor, objection. Lack of
12 foundation.

13 THE COURT: Overruled.

14 You may answer that if you can,
15 Detective.

16 THE WITNESS: Yes.

17 **Q.** BY MS. POLK: Tell the jury what trace
18 evidence is.

19 **A. Trace evidence is evidence that's very**
20 **small. We call "trace evidence" hair and carpet**
21 **fibers and things like that, things that you would**
22 **need to lift with tape or use a magnifying glass to**
23 **see. Things that are difficult to see, is what we**
24 **call trace evidence.**

25 **Q.** And what was the term use in the DPS lab

1 report if not "trace evidence"?

2 **A. It's "trace amount."**

3 **Q.** What's the difference between trace
4 amounts and trace evidence?

5 **A. Well, a trace amount is just a very small**
6 **amount of anything.**

7 **Q.** Mr. Kelly asked you whether you were
8 aware that 2-ethylhexanol, that a possible use is
9 as an inert ingredient for residential insect
10 spray. Do you recall that question?

11 **A. Yes.**

12 **Q.** Do you know what the term "inert" means?

13 **A. Inert means that it's a nonactive**
14 **ingredient.**

15 **Q.** And "residential" means?

16 **A. A house or a home.**

17 **Q.** Have you done some research as to what
18 products contain 2-ethyl-1-hexanol?

19 **A. Yes.**

20 **Q.** And what did you determine?

21 MR. KELLY: Your Honor, objection. Lack of
22 foundation.

23 THE COURT: Overruled.

24 THE WITNESS: I looked at some documents from
25 the Environmental Protection Agency, which, I

1 believe, is what Mr. Kelly was asking me questions
2 about. And according to the Environmental
3 Protection Agency, that chemical is used in food.
4 It's found in plastic. It's found in -- it's used
5 to make vinyl, like vinyl tarps. It's found in or
6 used in PVC pipes, like for plumbing. In food --
7 there's lots of different things.

8 **Q.** BY MS. POLK: You were asked about your
9 communications with the Arizona Department of
10 Public Safety crime lab. Did you personally ever
11 have conversations with anyone at the crime lab?

12 **A. Yes.**

13 **Q.** And with whom?

14 **A. I'm drawing a blank on his name, but it's**
15 **Dawn Sy's supervisor.**

16 **Q.** Did members of your department have
17 conversations with the crime lab?

18 **A. Yes.**

19 **Q.** And do you know whether or not the
20 medical examiner had conversations with the crime
21 lab?

22 MR. KELLY: Objection to the last question.

23 And also, Judge, I'd ask for a time frame be
24 provided as to when these conversations took place.

25 THE COURT: Questions can be asked if there's

1 foundation just as to time frame.

2 Q. BY MS. POLK: Detective, have you had the
3 opportunity to review the lab notes that were
4 maintained by Criminalist Dawn Sy?

5 A. Yes.

6 Q. And based on your review, did you learn
7 whether or not the state crime lab was
8 communicating directly with the medical examiners?

9 A. Yes.

10 MR. KELLY: Your Honor, again, it's requesting
11 a response based on hearsay. I move to admit that
12 document that was objected to. Now they're going
13 to ask for a hearsay response off it.

14 THE COURT: Sustained.

15 Q. BY MS. POLK: Detective, have you worked
16 with the state crime lab on other cases?

17 A. Yes.

18 Q. And describe the nature of your
19 relationship for the jury.

20 A. We usually keep in close contact on cases
21 that we're working. And more specifically, prior
22 to sending samples down, we'll ask them -- you
23 know -- what can you test? You know. This is the
24 evidence that I seized. What do you want me to
25 send down? That sort of thing.

1 And then usually when they're getting
2 ready to test, they'll give us a call and ask if
3 the case is resolved. Do they still need to test.
4 If they do, then what they're going to test for.
5 If it's DNA -- if there's a sample of DNA from a
6 suspect that they want to compare it to, things
7 like that.

8 Q. And how about after testing is done? Do
9 you receive information from the state crime lab?

10 A. Usually, yes.

11 Q. And in what form?

12 A. Well, it depends on the case. If it's a
13 serious case, they'll usually call us and go over
14 the lab results with us. If it's -- I'm not saying
15 DUI is not a serious case. But on a DUI usually
16 the lab results just come back. They're mailed
17 back. And they're received by our evidence
18 personnel, who forwards them to the officer that
19 sent them down to DPS. In serious felony cases,
20 usually they let us know. They give us a call with
21 what the result are.

22 Q. Regardless of what the results are?

23 A. Usually. Yeah.

24 Q. Did you get such a call in this case?

25 A. No.

1 Q. You were asked some questions about
2 information from a person named Rick Haddow. Do
3 you recall testifying at a hearing on February 3rd,
4 2010?

5 A. Yes.

6 Q. And at that hearing did you testify about
7 an air quality expert?

8 A. Yes.

9 Q. Mr. Kelly asked you whether the interview
10 that you had with Ms. Do on June 16th of 2010,
11 whether you had told Ms. Do that you had ruled out
12 carbon monoxide as well as carbon dioxide. And you
13 said, no, you had not.

14 Do you recall that?

15 A. Yes.

16 Q. Do you recall what you told Ms. Do during
17 that interview on June 16th, 2010, about carbon
18 dioxide?

19 A. Yes.

20 Q. And what did you tell her?

21 A. That I believed that the deaths were a
22 result of a combination of heat and carbon dioxide.

23 Q. Is that consistent with the information
24 that you learned from the man named Rick Haddow?

25 A. Yes.

1 Q. With regard to the sampling sizes of the
2 soil, why did you not seize all the dirt that was
3 in the area of the sweat lodge?

4 A. We just -- for one, we don't do that.
5 And for two, you can't just send a dump truckload
6 of dirt down to the lab to test. We sample things
7 and then send the samples down for testing.

8 Q. I'm going to put up on the overhead
9 Exhibit 505. Do you recall the question from
10 Mr. Kelly that you didn't test this, anything from
11 that pitcher of liquid?

12 A. Yes.

13 Q. Did you test that pitcher of liquid --

14 A. I did.

15 Q. -- or did you take samples from it?

16 A. Yes.

17 Q. I'm going to put up on the overhead --

18 MS. POLK: Your Honor, counsel has no
19 objection to Exhibit 992.

20 THE COURT: Exhibit 992 is admitted.
21 (Exhibit 992 admitted.)

22 Q. BY MS. POLK: I'm going to put 992 up on
23 the overhead. What does that show you, Detective?

24 A. There's an evidence marker on top of that
25 pitcher. I believe that it was because we took a

1 **sample from that pitcher. If I could look at my**
2 **evidence logs, then I can tell you for sure.**

3 Q. I can also put up on the overhead
4 Exhibit 297.

5 MS. POLK: Your Honor, counsel stipulates to
6 the admission of 297.

7 THE COURT: 297 is admitted.

8 (Exhibit 297 admitted.)

9 Q. BY MS. POLK: Does that help you
10 determine whether or not you took samples from that
11 pitcher of liquid?

12 A. Yes.

13 Q. Did you?

14 A. Yes.

15 Q. Did you send that to the lab for testing?

16 A. I don't think so.

17 Q. And why not?

18 A. There was no reason to.

19 MR. KELLY: Your Honor, objection.

20 THE COURT: Sustained.

21 Q. BY MS. POLK: Did you form a belief,
22 Detective, as to whether or not you needed to have
23 this liquid tested?

24 A. Yes.

25 Q. And what was that belief?

1 A. There was no correlations between the
2 people that consumed that liquid and the people
3 that got sick. In other words, some people drank
4 that liquid didn't get sick, and some people drank
5 it and got sick. That liquid has nothing to do
6 with people getting sick.

7 Q. Do you recall questions from Mr. Kelly
8 about a Dr. Ian Paul?

9 A. Yes.

10 Q. Do you know whether Dr. Paul has ever
11 treated a patient for heat stroke?

12 A. A live patient or a dead patient?

13 Q. A live patient.

14 A. I don't remember him saying that he had.

15 Q. And do you know whether Dr. Paul --
16 whether most of the autopsies done by Dr. Paul are
17 on the skeletal remains of people who died from
18 heat stroke?

19 A. Yes. I remember him saying that.

20 Q. Detective, you were shown Exhibit 366,
21 some of the medical records from Liz Neuman;
22 Exhibit 222, medical records from Sidney Spencer;
23 exhibit 213, medical records from Stephen Ray, and
24 Exhibit 175, medical records from Lou Caci.

25 Do you recall that?

1 A. Yes.

2 Q. With respect to the term "differential
3 diagnosis," do you know what that means?

4 A. Yes.

5 Q. What does that mean?

6 MR. KELLY: Your Honor, object to the form of
7 the question. Lack of foundation.

8 THE COURT: Sustained as to foundation.

9 Q. BY MS. POLK: What is your basis of
10 knowledge for familiarity with that term?

11 A. I think some of the doctors testified
12 about it during this trial.

13 MR. KELLY: Your Honor, I would object on the
14 basis of hearsay.

15 THE COURT: Sustained.

16 Q. BY MS. POLK: Detective, on
17 October 9th -- I'm going to take you back to
18 October 9th and what you were looking at as
19 possibilities to explain the deaths of the three
20 victims.

21 Do you recall?

22 A. Yes.

23 Q. Do you recall testifying about that on
24 direct?

25 A. Yes.

1 Q. With respect to other first responders,
2 do you know whether they also knew what had
3 happened?

4 A. They did not.

5 MR. KELLY: Your Honor, I'm going to object to
6 the form of the question and the response.

7 THE COURT: Sustained.

8 MR. KELLY: And ask that it be stricken.

9 THE COURT: Granted. It is.

10 Q. BY MS. POLK: Detective, Mr. Kelly asked
11 you to agree that various findings set forth in
12 those medical records that I've just given you the
13 exhibit numbers for --

14 MR. KELLY: Your Honor, I'm going to object.
15 That misstates my question. Exhibit speaks for
16 itself.

17 THE COURT: Ms. Polk, I don't think you quite
18 completed your question. It wasn't phrased in
19 terms of question is what I have here. Go ahead
20 and phrase a question.

21 Q. BY MS. POLK: Do you recall when
22 Mr. Kelly at the end had a little diagram and
23 talked about finding the medical records and asked
24 you to agree that those were possibly consistent
25 with other findings in the case?

1 **A. Yes.**

2 **Q.** Do you have a belief as to whether or not
3 what appeared in the early medical records were
4 consistent with what you were seeing on
5 October 9th?

6 **A. Yes.**

7 MR. KELLY: Your Honor, now I would object
8 based on 707. Lack of foundation.

9 THE COURT: Sustained.

10 And I need to see counsel, please.

11 (Sidebar conference.)

12 THE COURT: Ms. Polk, one of the grounds for
13 objection has been of a leading nature. And I
14 understand Mr. Kelly has inquired very -- in a lot
15 of areas over a number of hours with
16 Detective Diskin. But with the leading nature of
17 this, I am just wondering why the question isn't
18 just why as to -- if he disagreed with what
19 Mr. Kelly might have suggested he should have been
20 doing or something. But Mr. Kelly has repeatedly
21 objected concerning leading, and it's a legitimate
22 objection and the way it's coming up. That's my
23 observation.

24 MS. POLK: Your Honor, I can rephrase the
25 questions to ask if he disagrees with Mr. Kelly.

1 My reason for trying to focus the questions is
2 because there have been Court rulings about
3 information that does not come in. And I'm trying
4 to go carefully respecting those other rulings.

5 But if counsel wants me to say, do you
6 agree those medical findings are consistent with
7 the lab reports, I can ask him that.

8 THE COURT: That's the issue, Mr. Kelly. When
9 they're phrased that way, when there has been a
10 challenge suggesting you should have been doing
11 this or whatever, and then the obvious question on
12 redirect is why not?

13 MR. KELLY: Judge, here's the -- there are two
14 important distinctions. One is this final question
15 was asking the detective to provide an opinion as
16 to the veracity of the medical reports. And he
17 simply does not have a basis to provide that
18 opinion. My direct was solely focused on the
19 cross -- on the scope of his investigation on
20 October 9th, 2009.

21 These questions are asking him as to his
22 opinion, as he sits here today, after he's listened
23 to evidence at trial. And so when we talk about
24 the inadequacy of this investigation and why he
25 didn't do things, he told us on direct. And the

1 permissible answer is it was heat and the extreme
2 temperature of James Ray's sweat lodges.

3 I've stayed within the confines of the
4 Court's rulings in that regard. I have not opened
5 the door to any prior sweat lodge events. But now
6 these questions unduly emphasize this lay witness's
7 opinion as it relates to everything from medical
8 issues to issues better suited for the DPS
9 criminalist, to medical examiners, et cetera. And
10 they're highly improper.

11 MS. POLK: Your Honor, if Mr. Kelly didn't
12 want him to testify about these matters, he
13 shouldn't have questioned him on cross-examination.
14 Again, every single question I'm asking is because
15 it's something that Mr. Kelly asked him on cross.
16 Mr. Kelly wants it both ways. He wants to
17 cross-examine. He doesn't want the witness to be
18 able to explain the information.

19 I believe what this witness will testify
20 to right now is just that first responders didn't
21 know what was going on, and it was reasonable for
22 them to be looking at all sorts of issues, such as
23 chemical exposure. And that was consistent with
24 what the detective himself saw at the scene and
25 consistent with what he was thinking.

1 Mr. Kelly pulled out excerpts from
2 medical records from first responders and doctors
3 who saw the patients within the first day or two.
4 Pulled them out of context to suggest those were
5 findings, discharge findings, which they are not.
6 It's appropriate for me to go in and clear up that
7 this is early information consistent with what the
8 detective himself was seeing.

9 MR. KELLY: Judge, those exhibits were dated
10 October 8th and October 9th. And they're clues
11 that he didn't follow in this investigation. That
12 was the purpose of the cross-examination.

13 THE COURT: Did not what, Mr. Kelly?

14 MR. KELLY: That he did not follow in his
15 investigation.

16 THE COURT: That was understood that was the
17 reason for the questions. Well, I think what
18 really becomes important is the actual wording of
19 Mr. Kelly's questions. And if it takes looking at
20 the exhibits and having him respond to that exhibit
21 in some fashion, that would focus the question.

22 But just calling for general medical
23 opinions -- that's not what Mr. Kelly was
24 questioning about. He was not questioning him for
25 his medical opinions. It was whether or not there

1 was some consistency between observations of
2 medical people and evidence on the scene.
3 If it wasn't pursued, then they can be
4 asked why that wasn't important or something like
5 that. But just to get into medical opinions --

6 MS. POLK: Judge, my question was exactly what
7 you just said -- what they were doing consistent
8 with what the detective was seeing and thinking.
9 That's my question.

10 MR. KELLY: And, Judge, here's the problem:
11 He admitted on direct and cross that he hadn't even
12 looked at the records before he formulated his
13 opinion about the heat and extreme nature of the
14 sweat lodge ceremonies. So now we're going to get
15 up here and lead him through the answers the
16 prosecutor wants on redirect?

17 THE COURT: They can not -- they're completely
18 leading questions. There can't be any more. And I
19 understand the difference between directing the
20 witness to an area of examination. But to get in
21 and -- it just -- I'm sustaining the objection.

22 He can't -- he can't give medical
23 opinions. As the discussion here says if he hasn't
24 looked at it before, it's the same kind of -- well.

25 MS. POLK: Judge, I'll move on.

1 MR. KELLY: Your Honor, before we leave, I
2 would ask for some brief recross on the limited
3 issue of this EPA knowledge to establish to this
4 jury that he did that research between
5 cross-examination of Friday through today.

6 THE COURT: Maybe Ms. Polk wants to clear that
7 up. I don't want to get into recross. That's a
8 legitimate thing just to clear up.

9 MS. POLK: Okay.

10 THE COURT: The other thing, Mr. Li or whoever
11 presented this, I understand I'm not going to give
12 this instruction, but I will submit it for filing
13 right now.

14 MR. LI: Thank you, Your Honor.

15 (End of sidebar conference.)

16 THE COURT: Whenever you're ready, Ms. Polk,
17 please proceed.

18 Q. BY MS. POLK: Detective, Mr. Kelly asked
19 you about Exhibit 214, which is the patient record
20 for Stephen Ray. And he showed you the first page.
21 And I want to direct your attention to the second
22 page. I'm going to put it up on the overhead.

23 And do you see under injury details?

24 A. Yes.

25 Q. Do you see what's written here under

1 injury caused?

2 A. Yes.

3 Q. And what does that say?

4 A. **It says, accident poisoning, chemical**
5 **poisoning.**

6 Q. And what does it say right here?

7 A. **Drug -- I don't know what "NEC" means.**

8 Q. Let me direct your attention to the third
9 page, another area that Mr. Kelly did not show you.

10 MR. KELLY: Your Honor, I'm going to object to
11 the form of the question.

12 THE COURT: Sustained.

13 Q. BY MS. POLK: Do you see under airway?

14 A. Yes.

15 Q. I'm sorry. Do you see the next line?

16 It's a little bit hard to fit it on this exhibit.

17 It says, initiate I.V.?

18 A. Yes.

19 Q. And what does it say in this area over
20 here?

21 A. **It says, ongoing patient assessment.**
22 **I.V. initiated. 18 gauge RAC by C -- mentena (sic)**
23 **with blood set. 9 NSWO for possible dehydration.**
24 **Suspected heat stroke.**

25 Q. That's good. Thank you. When you first

1 arrived on scene, and based on the early
2 investigation, did you form a belief as to possible
3 causes of death?

4 A. Yes.

5 MR. KELLY: Your Honor, object to the form of
6 the question.

7 THE COURT: Sustained.

8 Q. BY MS. POLK: Detective, when you were
9 first on scene, based on what you knew in the early
10 morning hours, what was your approach at that time
11 to the investigation?

12 A. **To figure out what happened.**

13 Q. And early on did you eliminate anything?

14 A. Yes.

15 Q. What did you eliminate?

16 A. **Carbon monoxide. Can I explain that**
17 **answer?**

18 Q. Yes.

19 A. **I thought that this was carbon monoxide**
20 **because it's an enclosed sweat lodge. I thought**
21 **there must have been something burning in there. I**
22 **was surprised to find out it wasn't carbon**
23 **monoxide.**

24 Q. After you ruled that out, what did you
25 do? What was your approach?

1 **A. Interviewing witnesses, processing the**
2 **scene. I still had no idea what had happened.**

3 **Q.** Mr. Kelly played for you that audio with
4 somebody up at the dining room making the statement
5 that they were checking into whether or not it was
6 carbon monoxide with -- mixed with
7 organophosphates.

8 Do you recall that?

9 **A. Yes.**

10 **Q.** Was that consistent with the early
11 response?

12 **A. Yes.**

13 MR. KELLY: Objection.

14 THE COURT: Overruled.

15 **Q.** BY MS. POLK: Did you ever learn who it
16 was who made that statement?

17 **A. No.**

18 **Q.** And did anybody ever come forward to you
19 to report any findings with respect to
20 organophosphates?

21 **A. No.**

22 **Q.** Would you have expected that?

23 **A. No.**

24 **Q.** If somebody had found some evidence of
25 organophosphates, what would you expect?

1 **A. If the EMT found evidence of**
2 **organophosphates, he would probably pass that on to**
3 **the doctors treating the patients.**

4 MR. KELLY: Your Honor, objection.
5 Speculation.

6 THE COURT: Sustained.

7 **Q.** BY MS. POLK: Did anybody ever come
8 forward to you with information about
9 organophosphates?

10 **A. No.**

11 **Q.** Detective, when was it that you learned
12 about what Mr. Ray had said to participants before
13 they entered the sweat lodge?

14 **A. If I can just clarify the answer. There**
15 **were two different sweat lodge briefings. One was**
16 **down at the sweat lodge before -- just before the**
17 **participants went inside. I learned about some of**
18 **what was said during that from Debra and Ted**
19 **Mercer.**

20 **But it wasn't until later that I learned**
21 **about what we have the audio recording of -- of the**
22 **briefing in Crystal Hall before they went down to**
23 **the sweat lodge structure.**

24 **Q.** I'm go going to play for you from
25 Exhibit 734.

1 MR. KELLY: Judge, may we have a minute?

2 THE COURT: Yes.

3 MR. KELLY: Judge, if that is a portion of the
4 presweat lodge presentation that was admitted into
5 evidence, we'd ask that it be played in it's
6 entirety.

7 THE COURT: How much of an excerpt is this?

8 MS. POLK: Your Honor --

9 MR. KELLY: And I'm sorry. Secondly, Judge, I
10 would submit it's cumulative.

11 MS. POLK: Your Honor, these are clips. Each
12 of the clips has been admitted into evidence. And
13 I intend to play just five of them. And with
14 respect to each one, I have a question for the
15 detective.

16 THE COURT: Please approach.

17 (Sidebar conference.)

18 THE COURT: And what aspect of
19 cross-examination is this, Ms. Polk?

20 MS. POLK: This goes to the information that
21 the medical examiners heard when those medical
22 reports were used -- were written that Mr. Kelly
23 just showed the jury. And with respect to each of
24 these clips, they've all been admitted into
25 evidence. This would be similar to showing a

1 witness a photograph.

2 And then I'm going to ask the witness
3 whether or not that information was given, whether
4 or not he gave that information to the medical
5 examiners or he covered the exhibits that Mr. Kelly
6 talked about by exhibit number.

7 And I'm going to play a clip and ask the
8 witness whether or not he gave that information to
9 that doctor. I didn't mean to say medical
10 examiner. Those doctors.

11 Your, Honor, Mr. Kelly and Mr. Li have
12 played the clip with the organophosphate reference.
13 I'm losing count now. I think we're up to about
14 five different times. And it is appropriate for me
15 to question this witness using clips that have been
16 admitted into evidence to ask whether or not he
17 provided that information to the authors of those
18 medical records that Mr. Kelly dragged out, put up
19 on the overhead, and asked questions of this
20 witness about, specifically looking at the various
21 things that those medical doctors had written in
22 those reports.

23 MR. KELLY: Judge, there's a couple things.
24 First of all, there's a difference between using a
25 clip to point out a prior inconsistent statement or

1 using a clip to ask why you ignored a clue during
2 your investigation, such as 742 as used in those
3 two contexts, I believe, versus this proposed use
4 where, essentially, we're going to play to the jury
5 some clips and then ask the detective, did you say
6 that to the medical examiners on December 14th?
7 That's highly improper. Why not ask him what did
8 you tell them? This is an improper method of
9 refreshing recollection.

10 Finally, Judge, I don't know what's on
11 the clips.

12 THE COURT: Well, you do, but you just don't
13 know what exact section. You know what it's from.
14 It's from that 45 minute --

15 MS. POLK: Yes. They've all been identified.
16 They've been provided to the defense. There is
17 nothing improper about this at all. I'm not
18 playing it to refresh the witness's recollection.
19 I'm playing it so that much like a photograph the
20 jury can hear what this information is.

21 And the question to this witness is, did
22 you provide that information to those -- I think,
23 there are five different medical records that
24 Mr. Kelly put up on the overhead, his questions
25 specifically highlighting information in those

1 exhibits from October 8th and those early days.

2 It is appropriate for me to ask this
3 witness, did you give this information about what
4 Mr. Ray said. Because that is information that
5 would have assisted those doctors in reaching some
6 conclusions. The fact is, those doctors, even to
7 this day, have not been provided with that
8 information.

9 The defense is building a case on early
10 on what people suspected, when everybody, including
11 this detective -- nobody knew what was going on.
12 And they were all looking for possible clues.
13 They're building a case on that.

14 And it's appropriate for me to offer to
15 this witness, to play a clip to say, did you ever
16 provide that to this doctor who wrote that report?
17 The jury is entitled to know what information the
18 doctor did or did not have when they wrote those
19 reports.

20 THE COURT: In light of the questioning, I
21 agree with two things. First, parts of that have
22 been played repetitively too. It was played during
23 opening, as I recall, parts of it.

24 Secondly, it's, like, one elongated
25 leading question. It's, like, listen to all this.

1 And did you provide it? It's a leading question in
2 that fashion.

3 He can say what he provided to them, in
4 light of the questions that have been presented.
5 But to just play that tape, which he didn't hear
6 until -- he couldn't have heard it until the end of
7 January because it wasn't provided -- and say did
8 you give all that information, that's leading.
9 That's a leading question.

10 MS. POLK: How is playing a clip different
11 from showing a photograph on the overhead? A
12 photograph is a picture. These are words. These
13 are -- exhibits are admitted. And to show a
14 photograph to the witness and say, did you ask a
15 question about that photograph -- if playing an
16 audio clip is leading, then showing a photograph to
17 the witness is leading.

18 THE COURT: If you were to read the transcript
19 instead of playing the audio clip and say, you
20 know, Detective, did you tell the medical examiners
21 this? Let me read it to you. And you read it in
22 detail. And he goes, yes. That's just plain
23 leading. So he can answer the question.

24 MR. KELLY: Judge, he didn't even have the
25 tape, so it could not be used to refresh his

1 recollection.

2 THE COURT: It's not offering it for that.

3 MR. KELLY: And so I just don't see any
4 purpose. I think the question is, what did you
5 tell the medical examiners about the nature of the
6 sweat lodge? And then based on his recollection,
7 that's what he told them.

8 THE COURT: To just play all this information
9 and just say, is that exactly what you said,
10 Ms. Polk, how could that be anything other than
11 leading? Here's what's said, and did you relay all
12 that? And he didn't even hear the tape until late
13 January versus when he's talking to the medical
14 examiners in December.

15 MS. POLK: That's exactly the point. These
16 exhibits are in evidence. It's like using the
17 photograph and saying, did you show that photograph
18 to a witness? How is that leading to play
19 something that is in evidence and then say to the
20 witness, did you provide that information to the
21 authors of those medical records that Mr. Kelly
22 just showed you?

23 I fail to understand how it is leading to
24 play an audio clip that has been admitted, and then
25 my question to the witness is, did you provide that

1 information?

2 What's relevant for this jury is to know
3 what those doctors knew at the time they wrote
4 those things that Mr. Kelly has highlighted through
5 the questioning of this witness.

6 And so I am going back on redirect to let
7 the jury know what information those medical
8 doctors had when they made those conclusions and
9 what they did not have, or any of this information
10 about the heat.

11 THE COURT: After you lay it, you would be
12 laying it all out for the detective just for him to
13 say, yes. I gave all that information. And that's
14 leading. Sustained.

15 (End of sidebar conference.)

16 THE COURT: Ms. Polk?

17 Q. BY MS. POLK: Detective, you have talked
18 about the audio that you obtained and the jury has
19 heard. With respect to the questions that
20 Mr. Kelly had about the various medical records and
21 things written in those medical records by the
22 doctors, did you ever provide to those doctors --
23 those would be the doctors for Liz Neuman, for
24 Sidney Spencer, for Stephen Ray, and Lou Caci --
25 did you ever provide to them the information that

1 you learned from the audio?

2 A. No.

3 Q. And why not?

4 A. Well, because it was over a year later by
5 the time I had the audio from when they treated the
6 patients.

7 Q. And what is the information in the audio
8 that you did not provide to the those medical
9 doctors?

10 MR. KELLY: Your Honor, objection. Relevance.

11 THE COURT: Overruled.

12 You may answer that if you can,
13 Detective.

14 THE WITNESS: Yes. The information would have
15 been what James Ray told participants that they
16 were going to experience inside the sweat lodge,
17 the vomiting, it would be so hot, you would feel
18 like your skin was going to split, things of that
19 nature, that it would be hellacious hot, that you
20 would vomit, that you would be disoriented.

21 MR. KELLY: Objection. I'd object and ask
22 that the portion regarding vomiting be stricken
23 because it's simply not on the exhibit.

24 THE COURT: Ladies and gentlemen, that audio
25 has been admitted as evidence. That is something

1 you will be able to consider in your deliberations.

2 Again, what the attorneys say in a question is
3 never evidence. And you must assess answers as
4 well about what -- from witnesses you must assess
5 or evaluate that in terms of what the evidence
6 actually is that you have received.

7 Overruled.

8 Q. BY MS. POLK: Detective, at any time in
9 your investigation, did you provide that
10 information that you've just talked about, the
11 comments by Mr. Ray before participants went inside
12 his sweat lodge -- did you ever provide that to the
13 medical doctors who treated the various patients
14 and victims?

15 A. No, I didn't. Can I explain my previous
16 answer about vomiting?

17 MR. KELLY: Your Honor. I'd object to the
18 narrative response.

19 THE COURT: Sustained.

20 Q. BY MS. POLK: You were asked by Mr. Kelly
21 on his cross-examination whether you had jumped to
22 conclusions and ignored important evidence in this
23 case.

24 Do you recall that question?

25 A. Yes.

1 Q. Do you have a belief as to whether or not
2 you ignored important evidence in this case?

3 A. Yes.

4 Q. And what is your belief?

5 A. I did not ignore any evidence in this
6 case.

7 Q. Do you have an opinion as to whether or
8 not you jumped to conclusions in this case?

9 A. Yes.

10 Q. And what is your opinion?

11 A. That we did not jump to conclusions.

12 Q. When you investigate a case, do you try
13 to disprove a negative?

14 A. No.

15 Q. What does that mean?

16 A. That means to try and disprove something
17 that there's no evidence that it's involved to
18 begin with. Can I explain that?

19 Q. Yes.

20 MR. KELLY: Objection. I would object to
21 further inquiry along this line and ask that your
22 previous instruction given to the jury be reread
23 today.

24 THE COURT: The objection is sustained.

25 Q. BY MS. POLK: Detective, you were asked

1 many questions about chemicals from pesticides,
2 wood, tarps. Will you tell the jury during the
3 period of your investigation what information, if
4 any, you found with respect to those items.

5 **A. Can you ask the question one more time?**

6 **Q.** Mr. Kelly had asked you whether you had
7 ignored important evidence such as chemicals from
8 pesticides, tarps, and pressure-treated wood. Did
9 you find any evidence of those items?

10 **A. No.**

11 **Q.** Did you ignore credible evidence of
12 poisoning due to toxins?

13 MR. KELLY: Your Honor, object to the leading
14 nature of the question.

15 THE COURT: Sustained.

16 **Q.** BY MS. POLK: Detective, what evidence
17 did you look at?

18 **A. We looked at everything we could think**
19 **of. We sampled everything that was there.**

20 **Q.** What did your investigation lead you to?

21 **A. That this case was about the way that**
22 **Mr. Ray does his sweat lodge ceremonies, not what**
23 **potential toxins are in the sweat lodge.**

24 **Q.** Thank you, Detective.

25 Thank you, Your Honor.

1 THE COURT: Thank you, Ms. Polk. There was
2 one area --

3 MS. POLK: Oh. Your Honor, I can clear that
4 up. I forgot.

5 THE COURT: Otherwise Mr. Kelly can recross on
6 that.

7 **Q.** BY MS. POLK: Detective, you had
8 testified that you had done some research, and you
9 quoted to the jury some of your findings from the
10 Environmental Protection Agency with respect to the
11 uses of the 2-ethyl-1-hexanol.

12 When did you do that research?

13 **A. I think it was yesterday.**

14 **Q.** Did you do it at some point after
15 Mr. Kelly began his cross-examination?

16 **A. Yes.**

17 **Q.** Thank you.

18 THE COURT: Thank you, Counsel.

19 Ladies and gentlemen, any questions for
20 this witness?

21 Heidi has one, anyway.

22 Will the lawyers please approach to
23 review the question.

24 (Sidebar conference.)

25 MS. POLK: The state has no objection.

1 THE COURT: Thank you.

2 MR. KELLY: Judge, I don't have an objection
3 to the first question. But the second question is
4 requesting a hearsay response.

5 THE COURT: Was there -- just objectively was
6 there any return, any results?

7 MR. KELLY: I believe --

8 THE COURT: Ms. Polk?

9 MR. KELLY: I don't believe the detectives
10 ever contacted poison control. I think the doctors
11 did. So perhaps this witness doesn't have the
12 knowledge to answer the first question either.

13 MS. POLK: Your Honor, I believe this witness
14 has listened to the radio traffic. And that's when
15 the contact was made with Arizona Poison Control.

16 There is about two hours of radio traffic
17 from the time dispatch is first called. And I
18 think that the information goes to the impact on
19 this witness's investigation. And if the first
20 part is going to be answered, the entire question
21 should be answered or asked.

22 MR. LI: Your Honor, if I can add one thing to
23 complete the record. There is a mention of a
24 contact to the Arizona Poison Control in one of the
25 medical records as well. So while I think there

1 might have been some dispatch traffic which I don't
2 think we ever heard, there was a doctor who
3 contacted the Arizona Poison Control. That's the
4 same doctor who said it wasn't heat stroke. So
5 there's a little ambiguity there.

6 THE COURT: It's a yes or no that doesn't get
7 into substance. You stated Arizona Poison Control
8 contacted. Are there results from that? I think
9 that can be asked just that far. The follow up and
10 hearsay can't go there. But it's just general
11 background about what might be out there. So I'm
12 inclined to ask.

13 Anything else?

14 MR. KELLY: Judge, we'd request, again, the
15 reading of the instructions to the jury that you
16 provided last week, that this be read to them once
17 again at the end of Detective Diskin's testimony.

18 Again, despite this instruction and the
19 argument about case law, there was a question on
20 redirect about whether the evidence remained
21 available at the crime lab in Prescott Valley,
22 Arizona, on redirect.

23 In addition to that, Judge, we've heard
24 other questions that may imply or shift the burden
25 of proof. So I'd ask that that be instructed. We

1 provided a copy of a closed proposed jury
2 instruction regarding this detective's opinions and
3 conclusions. Testimony was replete with --

4 THE COURT: That's been filed. I filed that.
5 I did deny reading it. And I'm denying that,
6 although it's been filed and it's of record.

7 Mr. Kelly?

8 MR. KELLY: Finally, Judge, we believe that
9 sometime this afternoon is the appropriate time to
10 read the instruction regarding the Brady violation.

11 THE COURT: Okay.

12 Ms. Polk?

13 MS. POLK: Your Honor, with respect to the
14 instruction on burden shifting, first of all, the
15 Court already read it. Secondly, I provided the
16 Court with the cases that say it's appropriate to
17 ask about samples and that it is not burden
18 shifting to ask that.

19 So to read an instruction suggesting that
20 it's burden shifting when there are two cases on
21 point that say it's not burden shifting and the
22 state is allowed to ask them, there is no basis for
23 that.

24 MR. KELLY: Judge, if I may for the record.
25 The case cited by Ms. Polk contained a jury

1 instruction that you, of course, drafted and read
2 to this jury after -- after those comments were
3 made. There is an instruction to the jury as to
4 it's permissible use.

5 THE COURT: What really brought that about had
6 to do with the interviewing. And I'm going to make
7 the record so the record is clear that Mr. Kelly
8 has requested the two-paragraph instruction I read
9 very recently. It's -- the first paragraph starts
10 out, a criminal defendant is always free to
11 challenge.

12 The second paragraph, you heard testimony
13 this morning and yesterday regarding when and how
14 the detective -- just so it's identified. So
15 that's been offered. I'm not going to submit it.

16 And I'm going to read this question.
17 It's a yes or no response. I'll ask for follow up.
18 Any hearsay aspects would not be something that
19 would be discussed.

20 Thank you.

21 (End of sidebar conference.)

22 THE COURT: As you know, Detective, the
23 attorneys may wish to follow up.

24 THE WITNESS: Yes.

25 THE COURT: You stated that Arizona Poison

1 Control was contacted. Are there results from
2 them?

3 THE WITNESS: No.

4 THE COURT: Any follow up, Ms. Polk?

5 MS. POLK: No, Your Honor.

6 THE COURT: Mr. Kelly?

7 MR. KELLY: No. Thank you, Judge.

8 THE COURT: Thank you, Detective.

9 You may step down. Take a seat down at
10 counsel's table.

11 Mr. Hughes?

12 MR. HUGHES: Thank you, Your Honor.

13 The state calls Steve Page.

14 THE COURT: Sir, if you would please raise
15 your right hand and be sworn by the clerk.

16 STEVEN MICHAEL PAGE,
17 having been first duly sworn upon his oath to tell
18 the truth, the whole truth, and nothing but the
19 truth, testified as follows:

20 THE COURT: Please be seated here to my right.

21 Sir, please start by stating your full
22 name and also spelling it so we can get the
23 spelling correct.

24 THE WITNESS: Steven Michael Page;
25 S-t-e-v-e-n, M-i-c-h-a-e-l, P-a-g-e.

1 THE COURT: Thank you.

2 Mr. Hughes.

3 MR. HUGHES: Thank you.

4 DIRECT EXAMINATION

5 BY MR. HUGHES:

6 Q. Good afternoon, Mr. Page. Can you tell
7 us what you do for a living.

8 A. I'm a computer forensics analyst.

9 Q. And can you tell us what you were doing
10 for a living back in October of 2009.

11 A. I was a detective.

12 Q. With what agency?

13 A. Yavapai County Sheriff's Office.

14 Q. Did you assist the Yavapai County
15 Sheriff's Office with some investigation out at
16 Angel Valley in October of 2009?

17 A. Yes.

18 Q. And can you tell us briefly what it is
19 that you assisted with out at Angel Valley.

20 A. I conducted the measurements, took
21 measurements and things for the scene diagram.

22 Q. Have you had any training or experience
23 in taking measurements at a crime scene?

24 A. Yes.

25 Q. Can you tell us what that is.

1 **A. In 1985 I completed a course in**
 2 **residential architectural drafting through Yavapai**
 3 **College. I have had experience as a landscape**
 4 **designer in prior employment in a company I owned.**
 5 **In law enforcement I received training in accident**
 6 **investigation through the basic police academy.**
 7 **And I've received training in advanced accident --**
 8 **excuse me -- advanced accident investigation and in**
 9 **traffic crash reconstruction, all of which involved**
 10 **creating diagrams of scenes.**

11 **Q. Can you give us just a general walk**
 12 **through of how you would create a diagram of a**
 13 **scene. Let's say, for example, for whatever**
 14 **reason, this courtroom was a crime scene and the**
 15 **detective in charge asked you to create a diagram.**
 16 **How would you go about creating a diagram of the**
 17 **courtroom?**

18 **A. I would pick a location to -- as a**
 19 **reference point. That would be a starting point.**
 20 **And stretch a tape measure from that point outward**
 21 **to another location. And I'd use that as a**
 22 **baseline. And then any item that I wanted to**
 23 **measure, I would measure from that baseline, a**
 24 **distance down that baseline and then a distance**
 25 **away from that baseline, one direction or another.**

1 **Q. Sort of like an X-Y axis?**

2 **A. Yes.**

3 **Q. And in this particular case, did you**
 4 **prepare some diagrams and did you take some**
 5 **measurements out at the crime scene?**

6 **A. Yes, I did.**

7 MR. HUGHES: Your Honor, may I approach the
 8 witness?

9 THE COURT: You may.

10 **Q. BY MR. HUGHES: I'm going to show you**
 11 **what's been marked as Exhibit 342 and ask if you've**
 12 **had a chance to look at that?**

13 **A. Yes, I have.**

14 **Q. Can you tell us what Exhibit 342 is.**

15 **A. That -- I believe it was marked as "scene**
 16 **diagram" in the bottom right corner.**

17 **Q. I'm going to show you what's marked as**
 18 **Exhibit 343 and ask if you recognize that?**

19 **A. Yes.**

20 **Q. What is Exhibit 343?**

21 **A. That is a diagram of the lodge, the tent,**
 22 **and other structures in that area.**

23 **Q. And, finally, I'm going to show you the**
 24 **document marked as Exhibit 344 and ask if you**
 25 **recognize that document?**

1 **A. Yes, I do.**

2 **Q. And what is 344?**

3 **A. That is a representative of elevation**
 4 **view and measurements depicting the rough heights**
 5 **of the lodge.**

6 **Q. Who prepared exhibits 342, 343, and 344?**

7 **A. I did.**

8 MR. HUGHES: Your Honor, the state would move
 9 the admission of exhibits 342, 343, and 344.

10 MR. LI: No objection, Your Honor.

11 THE COURT: 342, 343, 344 are admitted.
 12 (Exhibits 342-344 admitted.)

13 **Q. BY MR. HUGHES: Detective, do you have**
 14 **copies of those with you?**

15 **A. Yes, I do.**

16 **Q. What I'm going to do, then, is put up**
 17 **Exhibit 342, which is a multipage document. We'll**
 18 **go through the specifics in a moment. But I'd like**
 19 **you to walk through and tell us in general what**
 20 **each page of the document refers to or what it**
 21 **tells us, starting off with the first page.**

22 **A. This diagram is titled the "Scene**
 23 **Diagram." It documents the location of evidence**
 24 **that was collected from the scene.**

25 **Q. And I note that it indicates that it's**

1 not to scale. Down in this area it says that. Can
 2 you tell us what that means.

3 **A. Yes. There is a certain amount of leeway**
 4 **that has to be given to the drawings. They may or**
 5 **may not be exactly to scale. It cannot be**
 6 **dependent upon to exactly duplicate where items**
 7 **were if you were to measure it off the paper.**

8 **Q. Did you use some sort of software to**
 9 **prepare these exhibits?**

10 **A. Yes.**

11 **Q. Can you tell us the type of software that**
 12 **you use.**

13 **A. The software is called "Crime Zone." It**
 14 **is used for creating diagrams and sketches.**

15 **Q. Can you tell us -- you indicated that at**
 16 **a crime scene you take a reading on along an X and**
 17 **Y axis based from a reference point. Is that**
 18 **something that is standard procedure at crime**
 19 **scenes?**

20 **A. Yes.**

21 **Q. And is this software set up to take those**
 22 **X and Y axis points?**

23 **A. Yes.**

24 **Q. Can you then tell us what page 2 in**
 25 **general is on this particular document.**

1 **A. Page 2 is a listing of the coordinates**
 2 **that were taken, the X and Y coordinates, as it**
 3 **were, for each item.**

4 **Q.** Can you tell us what in general each of
 5 the columns, then, what information can we glean
 6 from these different columns on page 2?

7 **A. The first column on the left titled**
 8 **"Point" -- that is just a numerical value I assign**
 9 **to each measurement I take.**

10 The next column titled From "RP East For a
 11 Distance" -- that is the horizontal or X axis
 12 distance from the starting point. Then I measure
 13 downward.

14 The next one will be the distance, either
 15 above or below that line that I measured, to an
 16 actual point. I note that they are either north or
 17 south. In this instance, the Y axis, as it were,
 18 laid roughly north or south.

19 **Q.** And then, finally, turning -- returning
 20 to the next page, can you tell us what the next
 21 page refers to.

22 **A. That was a complete listing of all the**
 23 **measurements that I took at the scene.**

24 **Q.** Do the two or the three diagrams that you
 25 prepared -- do they reference particular numbered

1 points?

2 **A. Yes.**

3 **Q.** And are all of the numbered point on each
 4 of the two diagrams?

5 **A. The two diagrams with numbered targets on**
 6 **them. Yes.**

7 **Q.** That was a poor question on my are part.
 8 Turning to the diagram that makes up
 9 Exhibit 342, does this diagram show all of the
 10 reference points that are listed on the attached
 11 sheet of paper?

12 **A. This diagram has three sheets with it. I**
 13 **believe the sheet -- the second sheet that shows a**
 14 **partial listing of data points -- those are the**
 15 **data points that are represented on this drawing.**

16 **Q.** And can you tell us what would be on the
 17 third sheet that we just looked at.

18 **A. The third sheet was the complete listing**
 19 **of all the data points. That includes data points**
 20 **that are also listed on one of the other exhibits.**

21 **Q.** Finally, there's a fourth sheet. Can you
 22 tell us what that document is.

23 **A. That's a continuation of the third sheet**
 24 **of the complete, as I stated it, full data point**
 25 **listing.**

1 **Q.** Using the easel, if you had a scene with
 2 a number of random points on it where there are
 3 items of evidence that you are interested in
 4 reporting on a map, can you show us how you would
 5 draw your baseline and how you would go about
 6 measuring the points that are indicated on the
 7 easel?

8 **A. Are you asking me to step up to the**
 9 **easel?**

10 **Q.** Would you, please?

11 **A. I would choose a location for a reference**
 12 **point, perhaps here, and stretch a tape down**
 13 **through the scene. And then take measurements**
 14 **wherever there were points to be taken, point to be**
 15 **documented. I would measure from this, being zero,**
 16 **and then down whatever these distances were. And**
 17 **then I would measure out that distance, that**
 18 **distance, such as that.**

19 **Q.** You can take a seat.

20 Can you tell us, then, is this a process
 21 that do you by yourself, or do you need an
 22 assistant?

23 **A. I need an assistant generally.**

24 **Q.** Can you tell us how you go about, then,
 25 taking measurements with the assistance of an

1 assistant.

2 **A. The blue line that I marked would be just**
 3 **a tape measure laid on the ground and left there.**
 4 **With an assistant, I then walk along the blue line**
 5 **and have the assistant take -- we use a another**
 6 **tape, second tape measure. I hold one end of the**
 7 **tape, and they hold the other. We go to each**
 8 **object, and I stand at the baseline, and they give**
 9 **me measurements of how far that object is from the**
 10 **baseline.**

11 **Q.** How do you figure out whereabouts on the
 12 baseline you're standing?

13 **A. I attempt to square myself with the**
 14 **baseline and face 90 degrees away from it, directly**
 15 **towards the object and estimate that 90 degree**
 16 **angle as best as possible at the scene.**

17 **Q.** And tell us what 90 degree angle you're
 18 talking about. And you can use the chart if that
 19 would assist.

20 **A. The 90 degrees would be trying to create**
 21 **a "T" right here. And that would be the 90 degree**
 22 **angle.**

23 **Q.** Do you use any sort of T-square or
 24 triangle or anything like that to make sure that
 25 the tape measure heading away from you at the

1 baseline to the evidence point is square to the
2 baseline?

3 **A. No, I don't.**

4 **Q.** Okay. Turning, then, to Exhibit 342, can
5 you tell us in general, then, what is depicted --
6 what do these numbers mean and what do these shapes
7 mean in general on page 1 of Exhibit 342?

8 **A. Are you referring -- when you use the**
9 **word "shapes," are you referring to the things I've**
10 **labeled as "tarp" and "table"?**

11 **Q.** Exactly. There's a circle. There's a
12 couple of what appear to be polygons or squares and
13 rectangles. Tell us in general what it is you're
14 referring to.

15 **A. The shapes, being the circles and**
16 **rectangles, squares, et cetera, would represent the**
17 **structures as they were that would have existed at**
18 **the property -- such as the lodge, as I labeled the**
19 **circle, and the fire pit within it; the wood pile**
20 **and the outside fire pit; the tarps, et cetera.**

21 **Q.** Now, there's something labeled a "fire
22 pit" that appears to be a square or a rectangle.

23 Was that a rectangular shape in the ground?

24 **A. Yes, it was.**

25 **Q.** Okay. How did you then determine the

1 dimensions, for example, of that outside fire pit?

2 **A. We measured from the baseline to the**
3 **center of the eastern side of the rectangle, the**
4 **eastern end of the rectangle, and then took a**
5 **measurement to that center point and then just**
6 **measured the length of that end overall.**

7 **Q.** Detective, the screen in front of you,
8 you can actually touch on it, and it will put a
9 mark up there in relatively the same place where
10 you touch. Can you show us where the reference
11 point is and tell us how you decide to pick that
12 point as a reference point.

13 **A. The reference point is right there.**
14 **Well, to the left of that.**

15 **Q.** Let me clear that out.

16 **A. All right. I just drew over it again.**
17 **That is the reference point, the dot right there.**

18 **Q.** What was at that reference point?

19 **A. It was simply a random point on the**
20 **ground.**

21 **Q.** Is it important to pick any particular
22 place as a reference point?

23 **A. Only one that is convenient to taking**
24 **measurements from.**

25 **Q.** And then can you show us, drawing on the

1 screen, approximately where your baseline ran.

2 Then, in other words, to determine, for
3 example, where the wood pile was, how would you go
4 about determining where point No. 1 on the wood
5 pile was located?

6 **A. I would have my assistant stand and hold**
7 **the tape measure at point No. 1, and I would**
8 **estimate a 90-degree angle on the baseline. And we**
9 **would measure the distance from that point to the**
10 **baseline.**

11 **Q.** And then can you tell us what points on
12 the wood pile you picked or you choose to measure
13 to or from.

14 **A. The points on the wood pile were based**
15 **on, as I recall, evidence tents that had been**
16 **chosen or placed there to denote pieces of firewood**
17 **that were going to be taken for evidence.**

18 **Q.** And showing you Exhibit 512, does that
19 exhibit show where those four point are on the wood
20 pile?

21 **A. Yes.**

22 **Q.** Can you tell us on the photo, then, what
23 would you have decided to measure from on that wood
24 pile.

25 **A. Can you ask your question again.**

1 **Q.** Let me put it this way: How does this
2 photograph correlate with the diagram that we've
3 just seen?

4 **A. From the white markers that are visible**
5 **at the top of the wood pile, those were -- those**
6 **pieces of wood that those mark are the point I took**
7 **measurements to.**

8 **Q.** And did you take any measurements to the
9 white markers around here in the fire pit?

10 **A. Yes, I did.**

11 **Q.** Now, the photograph may not be that
12 clear. But the markers on the wood pile, I
13 believe, go 1, 2, 3, and 4. On the chart that you
14 prepared, I think they go 1, 4, 3, and 2. Are the
15 numbers on the chart supposed to correlate or
16 correspond with the numbers on the photograph?

17 **A. No.**

18 **Q.** Can you tell us how that works.

19 **A. The numbers on the chart are just the**
20 **sequential number that I assign as I take**
21 **measurements. So it would apply to the order in**
22 **which I took measurements.**

23 **Q.** Still using this wood pile as an example
24 to figure out dimensions for the chart, can you
25 tell us, then, what numbers you came up with for

1 point No. 1 here on page 1 of Exhibit 342.

2 **A. I would have to look at the other pages.**

3 **Q.** Would that -- would those numbers be
4 shown, then, on page 2 of the exhibit?

5 **A. Yes.**

6 **Q.** And walk us through, then, for point 1,
7 if you would, and tell us what those numbers mean.

8 MR. LI: Your Honor, I don't have an objection
9 to this. I would stipulate to the accuracy to the
10 measurements made by former Detective Page.

11 THE COURT: Okay.

12 Mr. Hughes?

13 MR. LI: Just in the interest of time.

14 MR. HUGHES: Thank you. I would accept that
15 stipulation. I just want the jury to be able to
16 understand how to determine distances between
17 various points when they take this back with them.

18 THE COURT: The stipulation will be accepted
19 in terms of accuracy. You may explain the
20 procedure, go through that.

21 **Q.** BY MR. HUGHES: Can you explain, then,
22 what these numbers mean here in the chart.

23 **A. Starting on the left-hand column, under**
24 **the column heading "Point," the point No. 1, and**
25 **moving across to the right to the next column, the**

1 **distance down the baseline is 76 feet, 6 six**
2 **inches.**

3 **So that was 76 feet, 6 inches from the**
4 **reference point. And then the measurement to the**
5 **piece of firewood was 19 feet, zero inches north.**

6 **Q.** And if we wanted to determine, then, the
7 distance so we can determine distances on this
8 chart, if we wanted to determine the distance from,
9 say, point No. 4 over to, say, point No. 72 -- the
10 approximate distance -- is there a way you can make
11 that determination?

12 **A. Yes.**

13 **Q.** And can you show us, then, for 4 and 72,
14 how you would go about making that determination
15 for distances.

16 **A. I would determine the difference between**
17 **the distance from each point from the reference**
18 **point. For example, point No. 4 was 79 foot, 9**
19 **inches.**

20 **Q.** Is that this number here?

21 **A. Yes. And point No. 72 is 33 feet, 11**
22 **inches. Disregarding the inches and just looking**
23 **at the feet, they were approximately --**
24 **subtracting, 33 from 79, that would be**
25 **approximately 46 feet apart.**

1 **Q.** And then my -- nearly my final question
2 for you. You indicated that you draw a baseline.
3 And from the baseline you then would go down to a
4 point or you would go up to a point. If you're not
5 exactly perpendicular going out to the point --
6 let's say you go up at a slight angle, will that
7 affect your measurement of how far that point, say,
8 65, is from the baseline?

9 **A. It could. Yes.**

10 **Q.** And can you tell us how that -- let's say
11 you're not perpendicular but you go out at a
12 3-degree or 5-degree angle, something that looks
13 like it's perpendicular. How would that affect the
14 distance from the baseline to the point?

15 **A. If I were -- the broader the angle, the**
16 **wronger the measured distance would be from what a**
17 **true perpendicular distance would be.**

18 **Q.** And then moving to Exhibit 343, does this
19 give the dimensions of the sweat lodge itself?

20 **A. Yes, it does.**

21 **Q.** And can you tell us, by looking at
22 Exhibit 343, what the -- first of all, let me ask,
23 is the sweat lodge a perfect circle?

24 **A. No. It was not.**

25 **Q.** Did it have a different width in one

1 direction than it did in another direction?

2 **A. Yes, it did.**

3 **Q.** Can you tell us what two of those
4 representative widths would be or diameters.

5 **A. I would have to look at one of the other**
6 **exhibits.**

7 **Q.** Does Exhibit 344 give you that
8 information?

9 **A. Yes.**

10 **Q.** And can you tell us what some of the
11 measured diameters are that you found for the sweat
12 lodge?

13 **A. The north/south diameter on the inside**
14 **was measured at 23 feet, 4 inches. The east/west**
15 **diameter was measured at 22 feet, 11 inches.**

16 **Q.** And then to determine, for example, where
17 the fire pit was located inside the sweat lodge,
18 can you tell us at what point in the pit you chose
19 for point No. 74.

20 **A. That was estimated to be center of the**
21 **pit.**

22 **Q.** Were you the one that was standing over
23 the pit with the tape measure?

24 **A. No. I wasn't.**

25 **Q.** And was that your assistant that did

1 that?

2 **A. Yes.**

3 **Q.** Assuming your assistant picked the exact
4 center of the pit that was found inside, can you
5 tell us the distance from the back of the sweat
6 lodge to the pit?

7 **A. Yes.**

8 **Q.** And that would be points 36 to 74;
9 correct?

10 **A. Correct.**

11 **Q.** Is that information, then, provided on
12 page 2 of the exhibit?

13 **A. Yes.**

14 **Q.** Can you tell us, then, the distance
15 between points 36 and points 74.

16 **A. Subtracting the point 36 from point 74,
17 the distance is -- and, again, disregarding the
18 inches, it would be approximately 11 feet.**

19 **Q.** And with respect to the inches, is that
20 the number that's shown to the right of the
21 decimal?

22 **A. Yes.**

23 **Q.** For example, for point 26, the 7, does
24 that show .07 of a foot, or does that show 7
25 inches?

1 **A. That shows 7 inches.**

2 **Q.** I believe you said the distance between
3 these two points is about 11 feet?

4 **A. Yes.**

5 **Q.** Can you, then, tell us the distance from
6 point 29 and point 74 on the other side?

7 **A. Yes.**

8 **Q.** And what would that distance be?

9 **A. That would be approximately 13 feet.**

10 **Q.** Is your measurement, then, Detective,
11 from the back to the front would be approximately
12 13 plus 11, or 24 feet?

13 **A. That would be correct.**

14 **Q.** Just to get an idea of the scale, if I
15 stand here, can you go back 24 feet from me.

16 **A. It would be right here.**

17 **Q.** From this point here to where your finger
18 is?

19 **A. Yes.**

20 **Q.** Thank you, Detective. I don't believe I
21 have any other questions.

22 THE COURT: Thank you, Mr. Hughes.

23 Mr. Li?

24 MR. LI: Thank you, Your Honor.

25 / / /

CROSS-EXAMINATION

2 BY MR. LI:

3 **Q.** Good afternoon, Detective.

4 **A. Good afternoon.**

5 **Q.** What do you call a guy who is no longer a
6 detective? Is it still detective?

7 **A. No. Not necessarily.**

8 **Q.** All right. Well, I'll call you
9 detective.

10 **A. That's fine.**

11 **Q.** So the pit was off center by about two
12 feet, give or take; correct?

13 **A. Yes.**

14 **Q.** Towards the -- I guess, this would be the
15 east. Towards the east it was off center by about
16 two feet?

17 **A. Actually, that would be west.**

18 **Q.** Sorry. Two feet short to the east, two
19 feet long to the west?

20 **A. The opposite. I believe it would be two
21 feet closer to the west than it was to the east.**

22 **Q.** Okay. So it's a little closer to the
23 east -- I'm sorry. You're exactly right. It's a
24 little closer to the west, and it's a little
25 further away, about two feet further away, from the

1 east edge; correct?

2 **A. Yes.**

3 **Q.** And the whole sweat lodge was
4 approximately 23, 24 feet in diameter?

5 **A. Yes.**

6 **Q.** And it's not a perfect circle because
7 it's made out of sticks and what have you?

8 **A. Correct.**

9 **Q.** If we could just have Exhibit 144 up on
10 the overhead. Do you see this log that I'm
11 pointing out here?

12 **A. Yes.**

13 **Q.** Would you agree with me that log is sort
14 of to the back of the tarps that are depicted on
15 Exhibit 343, for instance? It's sort of to the
16 back edge of the tarp, the southern edge of the
17 tarp?

18 **A. Yes.**

19 MR. LI: If I could have Exhibit 343 up.

20 **Q.** So would it be fair to say with your map
21 here that the log would be about approximately
22 where I've placed that red mark?

23 **A. It would appear in that general area.**

24 **Q.** And I want to be precise because this is
25 hard to draw on. Does that appear right?

1 **A. That appears close. Yes.**

2 **Q.** Now, let's assume for a second that this
3 lodge here is about 23, 24 feet in diameter. Fair
4 enough?

5 **A. Uh-huh.**

6 **Q.** Would you agree with me -- and this is
7 just eyeballing it here -- that the log is about
8 23, 24 or maybe even more feet from the door to the
9 sweat lodge? Just based on your map here, which I
10 understand is not to scale, but is that about
11 right?

12 **A. It would appear close to that.**

13 **Q.** Okay. I'm going to -- like, the distance
14 from here, it actually looks a little greater than,
15 say, the diameter there?

16 **A. Yes.**

17 **Q.** Okay. So if the sweat lodge's diameter
18 is about 23, 24 feet, you're going to figure
19 this -- from the doorway to the log may be 30 feet?

20 **A. I don't know.**

21 **Q.** Between 30 feet and 24 feet, give or
22 take?

23 **A. I would really prefer not to guess at
24 that.**

25 **Q.** Okay. Why don't we -- just because it's

1 your map, can we call it 24 feet, then?

2 The log was fairly close to the end of
3 the tarp on the right; correct?

4 **A. Correct. Yes.**

5 **Q.** I mean, if you want to look at
6 Exhibit 144 again --

7 **A. Sure.**

8 **Q.** See that? See where it is?

9 **A. Within a few feet at least.**

10 **Q.** Within a few feet to the end. I
11 recognize you're kind of ballparking it here. I'm
12 not looking for precision. I just want a sort of
13 general ballpark from here -- from the log to the
14 door of the sweat lodge, to go back to Exhibit 343,
15 if the log -- is that fair where I've put it?

16 **A. Yes.**

17 **Q.** Okay. So from the log to, say, the door
18 on your map, appears to be at least a greater
19 distance than the diameter of the sweat lodge;
20 correct?

21 **A. That would appear true. Yes.**

22 **Q.** And you generated this map?

23 **A. Yes.**

24 **Q.** And you did your best to make it as
25 accurate as possible?

1 **A. Yes.**

2 **Q.** Fair to say you want to call it greater
3 than 24 feet?

4 **A. It would appear to be a greater distance
5 than the diameter of the circle used.**

6 **MR. LI:** May I approach, Your Honor?

7 **THE COURT:** Yes.

8 **Q.** BY **MR. LI:** I'm going to do this whole
9 thing with the tape measure again. I'm going to
10 do -- let's do 24 plus 24. We'll make that 48
11 feet.

12 **A. Okay.**

13 **Q.** This is a 30 foot -- I'll do 30 feet
14 worth. So this is 30 feet. You can't see it down
15 here, but if I represent to you this is a 30-foot
16 tape measure, and I'm at the end, this is about 30
17 feet?

18 **A. Yes.**

19 **Q.** I'm going to put it right here. I'll put
20 it on the ground, lock it off. And I'm going to
21 walk about 10 feet more.

22 **A. Okay.**

23 **Q.** Give or take. Is that about fair?

24 **A. Yes.**

25 **Q.** Now, if I walked another 8 feet, I'd be

1 out of this courtroom, wouldn't I?

2 **A. Correct.**

3 **Q.** If I walked another 10 feet, so that's 50
4 feet, I would be out in the hallway?

5 **A. Yes.**

6 **Q.** So would it be fair to say, that based on
7 your map that you generated with the computer
8 program and all the techniques that Mr. Hughes and
9 you discussed, would it be fair to say that the log
10 is, basically, out in the hallway if that's the
11 back of the sweat lodge?

12 **A. From the opposite --**

13 **Q.** The very back of the sweat lodge?

14 **A. Yes.**

15 **Q.** All the way out into hallway. That's
16 where the log would be; correct?

17 **A. Yes.**

18 **Q.** And then I think you had estimated when
19 you were holding up the thing, the tape measure,
20 that somewhere around here was 23 feet. Correct?

21 **A. Slightly behind Mr. Hughes' chair.**

22 **Q.** Slightly behind Mr. Hughes. I'd be
23 standing at the door right now from where you were
24 standing over there; correct?

25 **A. Yes.**

1 Q. And from where Mr. Hughes is, the door to
2 where the log would be, the log would be all the
3 way out the door; correct?
4 A. Yes.
5 Q. Now, you've probably done some geometry
6 in your career as a landscape architect and crime
7 scene diagramer?
8 A. Yes.
9 Q. And you know how to estimate square
10 footage, for instance?
11 A. Yes.
12 Q. Of a circle?
13 A. Yes.
14 Q. You're familiar with the $\pi \times r^2$ squared?
15 A. Yes.
16 Q. I'm not going to ask you to do this math
17 in your head. But let's assume for a second that
18 the sweat lodge is about 11 1/2 feet by -- I'm
19 sorry. 11 1/2 feet in -- the radius is about
20 11 1/2 feet. Fair assumption?
21 A. Yes.
22 Q. Close enough. And $\pi \times r^2$ squared. So
23 11 1/2 times 11 1/2 is about 132.25?
24 A. I would have to take your word for it at
25 the moment.

1 Q. You wouldn't have any reason to disagree
2 with that, would you?
3 A. No.
4 Q. I can break out a calculator if you want.
5 A. I'll take it face value.
6 Q. And then multiplying that 132.25 by π ,
7 which is 3.1415, et cetera, comes out to about 415
8 square feet?
9 A. Okay.
10 Q. So the total square footage of that sweat
11 lodge that we just kind of described to this jury
12 is about 415 square feet?
13 A. Okay.
14 Q. I'm going to take what's been marked for
15 demonstrative purposes as Exhibit 985, which is
16 some of the dirt that was collected from the sweat
17 lodge, from the interior of the sweat lodge.
18 If I may just show the jury?
19 THE COURT: Yes.
20 Q. BY MR. LI: This is one of four samples
21 that were collected.
22 Now. Sir, I'm not going to ask you to
23 touch it. But it's in a film canister; right?
24 A. Correct.
25 Q. Just ballparking that, it's probably

1 about an inch by an inch by an inch, understanding
2 that it's actually a cylinder. But -- you know --
3 it's about an inch by an inch?
4 A. Correct.
5 Q. Just for purposes of this discussion,
6 fair to say that's about a cubic inch of soil?
7 A. Yes.
8 Q. I'm going to do some more math. And I'm
9 not going to ask you to know how many inches,
10 square inches, there are in 415 square feet. Will
11 you take my word that there are almost 60,000
12 square inches in 415 square feet?
13 A. All right.
14 Q. Okay. So I'll do the math for you. One
15 square foot is 12 by 12 in terms of inches;
16 correct?
17 A. Correct.
18 Q. And 12 by 12 is 144; correct?
19 A. Right.
20 Q. 144 times 415 turns out to be 59,760
21 square inches. And so that's -- let's call it
22 60,000 square inches. Fair enough?
23 A. All right.
24 Q. And what we have here is about 4 square
25 inches of dirt. Is that about right? I mean, I

1 understand they're cubes. But about 4 square
2 inches of dirt?
3 A. From four canisters of that have size,
4 yes.
5 Q. Okay. If you divide -- you want to get
6 the percentage of that, if you divide 4 by 59,750,
7 you end up with a figure that is 0.00006693.
8 That's the number you'd get. I'm not asking you to
9 verify this but -- well, I'm asking you to verify
10 this.
11 Does that sound about right?
12 A. I don't know.
13 Q. Shall I break out the calculator?
14 THE COURT: Mr. Li, I have to ask, how much
15 longer do you anticipate?
16 MR. LI: Not much longer, Your Honor.
17 THE COURT: Because we've gone over the 90
18 minutes.
19 MR. LI: It will be five minutes.
20 Q. Four divided by -- what did I say?
21 59,750 equals 0.00006693?
22 A. Four zeros.
23 Q. 0.00006693?
24 A. Yes.
25 Q. So my math is correct?

- 1 **A. Yes.**
 2 **Q.** You'd agree with me that if you turn this
 3 into a percentage, you're talking about
 4 0.006693 percent; is that correct?
 5 **A. Yes.**
 6 **Q.** So is it fair to say that the samples
 7 that were collected here, 4 cubic inches, equals
 8 0.006693 percent, so less than 1 percent?
 9 **A. That would be approximate.**
 10 **Q.** Okay. Well, it's actually about -- I
 11 think it's, like, .066 of a percent. Is that
 12 right?
 13 **A. For the math that we've done there, yes.**
 14 **Q.** Okay. So you're talking a whole lot less
 15 than 1 percent; is that right?
 16 **A. Yes.**
 17 **Q.** Now, if we can just talk for a second
 18 about the area of the coverings. Okay? Let's
 19 start with -- I'm just going to ask for a ballpark
 20 figure on this one. You figure 415 square feet is
 21 the floor of the sweat lodge; correct?
 22 **A. Right.**
 23 **Q.** You've got a kind of a dome. You have to
 24 do calculus to figure out what the actual square
 25 footage of that dome is; correct?

- 1 **A. Yes.**
 2 **Q.** And it's going to be more than 415,
 3 probably more than 500 square feet; correct?
 4 **A. Can you state that again?**
 5 **Q.** Yeah. Look, it's a dome; right?
 6 **A. Right.**
 7 **Q.** So the square footage is going to be
 8 significantly more than the floor?
 9 **A. Correct.**
 10 **Q.** And just ballpark estimate maybe 500
 11 square feet?
 12 **A. My calculus -- what I learned is very**
 13 **rusty.**
 14 **Q.** Same here. Same here. So let's take 500
 15 square feet as a figure. Fair enough?
 16 **A. To use --**
 17 **Q.** Just to use for purposes of this
 18 explanation. If you took four 10 by 10 square --
 19 10 inch by 10 inch squares, you are talking about
 20 less than 4 square feet out of 400, 500 square feet
 21 of area; correct?
 22 **A. Pardon me. What are you referring to as**
 23 **squares that the detective took?**
 24 **Q.** The detective took four cross-sections of
 25 the tarp from the cardinal corners. Are you

- 1 familiar with that?
 2 **A. The samples of the roof?**
 3 **Q.** The samples of the material covering the
 4 sweat lodge?
 5 **A. Yes.**
 6 MR. LI: And if I could have Exhibit 342 up.
 7 **Q.** And you denoted those 71, 70, 69, and 72
 8 on your chart there; correct?
 9 **A. Yes.**
 10 **Q.** Okay. So those are the things we're
 11 talking about here. These are these
 12 cross-sections. And we're talking about a total
 13 of, maybe, less than four square feet?
 14 **A. In area?**
 15 **Q.** In area.
 16 **A. Yes.**
 17 **Q.** And if the total area of the dome is,
 18 like, 500 square feet, give or take?
 19 **A. Okay.**
 20 **Q.** You're again talking less than 1 percent,
 21 are you not, of the entire square footage of all
 22 the coverings. Is that true?
 23 **A. Without calculating it, I would stipulate**
 24 **to that, the accuracy of that.**
 25 **Q.** All right. But we are talking about a

- 1 very small percentage, are we not, of the entire
 2 covering of the sweat lodge?
 3 **A. Yes.**
 4 **Q.** We're talking 4 square feet out of at
 5 least 415 square feet, plus whatever additional
 6 square feet you get from the making the dome. Is
 7 that right?
 8 **A. Yes.**
 9 **Q.** Just so we're clear, the pit -- and you
 10 were working for the state at the time. The fire
 11 pit is off center; correct?
 12 **A. You're referring to the fire pit inside**
 13 **the --**
 14 **Q.** Inside the sweat lodge.
 15 **A. Yes.**
 16 **Q.** And it's off by about two feet; correct?
 17 **A. Yes.**
 18 MR. LI: I have nothing further.
 19 THE COURT: Thank you, Mr. Li.
 20 Mr. Hughes, do you have redirect?
 21 MR. HUGHES: I do, Your Honor. And I realize
 22 we're past our break period, but it's very short.
 23 THE COURT: If it is, go ahead. Otherwise we
 24 really do need a break.
 25 MR. HUGHES: Okay.

REDIRECT EXAMINATION

1 BY MR. HUGHES:

2 Q. Detective, is this drawing to scale?

3 A. No, it isn't.

4 Q. Is there -- putting up 343, is there an
5 easy way to determine the distance from point 7,
6 which is approximately where the end of that log
7 was, to, say, point 29?

8 A. Yes.

9 Q. How would you go about doing that?

10 A. I would use a mathematical formula
11 applied to right triangles to calculate the
12 distance.

13 Q. Would that involve trigonometry?

14 A. No. It's called the "Pythagorean
15 Theorem."

16 Q. Okay. And do you know how to -- can you
17 do that calculation right now?

18 A. Yes.

19 Q. And will it take more than a minute or
20 two to do?

21 A. If the Court will allow me to use some
22 scratch paper or a calculator.

23 MR. LI: I have a calculator.

24 THE COURT: Would you like a calculator or

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1 some scratch paper?

2 THE WITNESS: Probably both.

3 MR. LI: May I approach, Your Honor?

4 THE COURT: Yes.

5 Q. BY MR. HUGHES: Detective, if you can do
6 that in your head, it will give Mina a moment or
7 two to rest her hands. If you don't say anything,
8 she won't have to type anything.

9 A. All right. Just to clarify, that's the
10 distance between point 7 and point 29?

11 Q. That's correct. Between those two
12 points.

13 A. I'll need to refer to the measurement
14 page from my notes or from the screen.

15 THE COURT: That exhibit number, Mr. Hughes?

16 MR. HUGHES: This is Exhibit 343.

17 THE WITNESS: Unfortunately, the calculator
18 went to sleep.

19 MR. LI: Your Honor, may I approach?

20 THE COURT: Yes.

21 THE WITNESS: All right. The distance between
22 point 7 and point 29 is approximately 33 feet.

23 Q. BY MR. HUGHES: And does that distance,
24 again, depend on -- within some leeway, on whether
25 the angle from your baseline is perfectly

1 perpendicular or at a slight angle to that

2 perpendicular?

3 A. Yes.

4 Q. Okay. Finally, there's a point in the
5 center of this pit. I asked you that. You said
6 someone else went to the pit. Did you ever look at
7 the fire pit inside the sweat lodge?

8 A. Yes.

9 Q. Do you know, was that fire pit a perfect
10 circle?

11 A. I don't recall.

12 Q. Thank you, Detective.

13 I don't have any other questions.

14 THE COURT: Thank you.

15 Any questions for this witness, ladies
16 and gentlemen?

17 And then may Mr. Page be excused as a
18 witness, Mr. Hughes?

19 MR. HUGHES: Your Honor, the state would like
20 to keep him subject to recall.

21 THE COURT: Okay.

22 You will be excused, temporarily anyway,
23 Mr. Page. That means you may be called back.
24 Remember the rule of exclusion of witnesses has
25 been invoked in this case. And I'm sure you know

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1 what that means. You cannot communicate or attempt
2 to communicate with any other witness about your
3 testimony or this case until the trial is
4 completely over.

5 It would be a good idea not to talk to
6 anyone about the case until it's over. However,
7 you can talk to the attorneys as long as no other
8 witnesses are present.

9 Do you understand all that.

10 THE WITNESS: Yes, sir, I do.

11 THE COURT: Thank you.

12 We will take the evening recess at this
13 time. Ladies and gentlemen, please remember the
14 admonition. I do have a hearing in another matter
15 tomorrow at 4:00 o'clock. So I will have to do
16 that at that time. So, therefore, we will have to
17 recess, of course, by that time.

18 So, again, remember the admonition. And
19 you are excused at this time.

20 Thank you.

21 (The proceedings concluded.)

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24

25

1 STATE OF ARIZONA }
2 COUNTY OF YAVAPAI } ss: REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action

16 In witness whereof, I have affixed my
17 signature this 15th day of May, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

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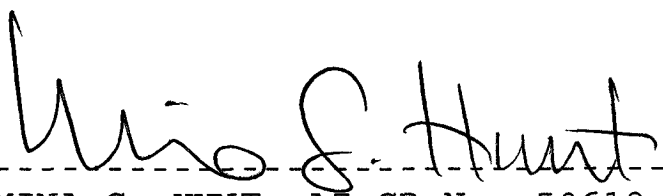
1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)
4

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14 to, employed by, nor of counsel for any of the
15 parties or attorneys herein, nor otherwise
16 interested in the result of the within action.

17 In witness whereof, I have affixed my
18 signature this 15th day of May, 2011.
19
20

21
22 
23 -----
24 MINA G. HUNT, AZ CR No. 50619
25 CA CSR No. 8335